Petition

Office - Supreme Court, U.S.
FILED
JAN 20 1982
ALEXANDER L. STEVAS
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81-1358

No. 81-

IN THE

Supreme Court of the United States

October Term, 1981

FLEER CORPORATION,

Petitioner

v.

TOPPS CHEWING GUM, INC.,

and

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether a Court of Appeals may set aside the controlling factual findings of a District Judge without acknowledging that it has done so and after stating that it assumes them to be correct.

2. Whether the exclusion of all practical competition is a violation of Section 2 of the Sherman Act.

3. Whether a monopoly resulting from the accumulation of exclusive rights to publish pictures of individuals enjoys any exemption from the antitrust laws.

NOTE: Fleer Corporation has the following subsidiaries which are not wholly owned: Fleer, Ltd.—Fleer Ltee., Fleer Espanola, S. A. and Dr. Torrents, S. A.

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Fleer Corporation, hereby prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this matter and in support thereof states the following:

DECISIONS BELOW

An interlocutory opinion of the District Court was reported at 415 F. Supp. 176 (E. D. Pa. 1976). The final opinion of the District Court was reported at 501 F. Supp. 485 (E. D. Pa. 1980). The opinion of the Court of Appeals was reported at 658 F. 2d 139 (3d Cir. 1981).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals (at Nos. 80-2537, 80-2538, 80-2539 and 81-1104) issued on August 25, 1981. A timely motion for rehearing was denied on October 22, 1981 and this petition for certiorari is filed within 90 days of that date. This Court has jurisdiction under 28 U. S. C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act (15 U. S. C. § 1) reads as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Act (15 U. S. C. § 2) reads as follows:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

A. The Parties and the Product

Petitioner Fleer Corporation and respondent Topps Chewing Gum, Inc. compete in the general line of bubble gum, candy and novelties for children. In this petition, Fleer seeks review of the judicial sanction given by the Court of Appeals to Topps's longstanding monopoly in a product which is "an important and distinctive part of many childhoods" (A4; A42, ¶ 85), to wit, baseball trading cards.[1]

Respondent Major League Baseball Players Association was joined as a defendant because, by contract and conduct, it protected Topps's monopoly. The Association is the collective bargaining agent for all major league players.

B. Defendants' Contracts and Practices

Topps achieved its monopoly in 1956 by buying out its only competitor. From 1956 on, Topps maintained its monopoly by written agreements with every major and minor league baseball player granting Topps the exclusive right to sell baseball trading cards either alone or with chewing gum, candy or confection. Under these

1. Baseball trading cards are the familiar pocket-size cards with a picture of a major league player on one side and his statistics on the other. The role of baseball cards in the lives of many young Americans has been described as follows:

> "It happens every spring while the major league pitchers and swatters are still down south grooving their arms or their bats. . . . The call of the baseball card is heard each March throughout the towns and cities of America. The first pack of baseball cards . . . heralds the arrival of the new season—not spring, or even baseball season, but baseball—card season." Clark, *The Complete Book of Baseball Cards* (Plaintiff's Exhibit 307), at 103.

agreements, all minor league players have been committed exclusively to Topps for the time it takes them to reach the major plus five years (A59, ¶ 112); 50% of the major leaguers have been committed for five years and the remaining 50% for six years (A36, ¶ 13).[2]

The agreements between Topps and the players are only the first component of the competitive barrier. The second component is the "commercial authorizations" which all major league players have granted to the Association since 1966. By these authorizations, the players have made the Association their exclusive agent to license their pictures in a group.[3] The Association has thus acquired all trading card rights not previously granted by the players to Topps.

The third component is a 1968 agreement between Topps and the Association which eliminated competition between them and divided the fruits of Topps's monopoly. In that year, the Association concluded that Topps's agreements with the players were far too restrictive and the annual royalty ($125 per player) were far too low. Consequently, the Association instructed its members not to renew their contracts with Topps. When this tactic proved successful, Topps elected to buy off the Association by giving it (the Association) a share in Topps's baseball card income. This converted the parties from the status of competitors for player licensing rights (with the Association attempting to terminate Topps's rights (A42, ¶ 33)) to the status of co-venturers in the exploitation of those rights.

The resulting agreement between Topps and the Association,[4] which was extended in 1973, provided:

2. The form of Topps's agreements with the players is included in the Appendix at A115.

3. The form of the commercial authorizations is included in the Appendix at A120.

4. The Agreement is included in the Appendix at A122.

(a) The Association will not interfere with Topps's efforts to sign and to renew its player contracts (A43, ¶ 35(4)). This eliminates the only practicable challenge to Topps's monopoly (A102).

(b) Topps's royalties to the players will be based on a percentage of sales rather than a flat dollar amount. (A42, ¶ 35(1)). This gives the Association a direct stake in Topps's success because the royalties are paid to the Association for distribution to its members.

(c) The Association will advise Topps of requests for licenses which might infringe Topps's rights and Topps will determine whether to waive its rights. (A123-124, ¶ 5). This set the stage for continuing consultation and concert of action between Topps and the Association.

As a result of the 1968 Agreement, the defendants routinely consulted about license requests received by the Association (A55, ¶ 99). Topps objected to any requested license that might threaten its monopoly (A56, ¶ 102). The Association, being anxious to avoid conflict with Topps (A55, ¶ 99) because of the percentage royalties, never licensed any product that promised "meaningful competition" to Topps's product (A57, ¶ 104).

C. Proceedings in the District Court

Fleer brought this action in the District Court for the Eastern District of Pennsylvania invoking jurisdiction under 28 U. S. C. § 1337. After a full trial, that Court concluded that "[t]ogether, Topps and the Players Association have all the market power there is in the baseball card market; and they have unlawfully exercised that power in a way which has left the Topps product alone in

the market." (A86). Because the defendants "completely foreclosed entry into" the market (A91), the District Court found that Topps and the Association had violated both Sections 1 and 2 of the Sherman Act. The District Court issued an injunction forbidding Topps from enforcing its exclusive rights and requiring the Association to offer at least one license competitive with Topps.

D. Proceedings in the Court of Appeals

Upon appeal by Topps and the Association, the Court of Appeals reversed the District Court and dissolved the injunction. The statement of the case in the opinion of the Court of Appeals described a competitive situation precisely opposite to that found by the District Court:

1. Without acknowledging the District Court's finding that the Association had "never licensed a baseball card product that promised to provide meaningful competition to Topps' product" (A57, ¶ 104), the Court of Appeals stated that the Association *did* license "products competitive with Topps" (¶ 26). There is no explanation for this factual reversal.

2. Without acknowledging the District Court's finding that Topps and the Association "completely foreclosed entry" into the market (A91), the Court of Appeals stated that Topps and the Association "did not have the power to exclude all competition" (A32) and, indeed, that there was "ample opportunity" to challenge Topps (A30). Again, there was no explanation.

On the basis of its statement of the case, the Court of Appeals found that there was no violation of either Section 1 or 2.

REASONS FOR GRANTING THE WRIT

1. This Court Should Grant the Petition to Establish That Courts of Appeals May Not Set Aside Controlling Factual Findings Without Acknowledgement and Explanation.

The District Court found a product market of "pocket-size pictures of active major league baseball players, sold alone or in combination with a low-cost premium, at a price of 15 to 50 cents" (A52-53, ¶ 87).[5] In the delineation of this market, the per card price of products containing baseball cards was a controlling factor. The District Court made findings on who buys baseball cards and why and concluded that purchasers "will seek the greatest number of cards for the least money." (A64, ¶ 129). Thus, it found that "to compete with Topps, a competitor would be required to market a baseball card product approximately equal to Topps's product on a per card basis" (A63, ¶ 129) and that products with higher per card prices were not attractive to baseball card collectors (A48, ¶ 62).

The Court of Appeals purported to accept the District Court's market definition (¶ A17) but its opinion flies in the face of that definition. It described as "competitive" products with per card prices much higher than Topps's, thus greatly expanding the market[6] (A26-27). The result was that the Court of Appeals analyzed the defend-

5. The District Court's findings on market and competition were based on its analysis of a trial record which included 6,000 pages of testimony, including conflicting oral testimony of four experts and over 8,000 exhibits.

6. Topps's price per card ranged from 1.0 to 1.5 cents (*See* A45, ¶ 49). The Court of Appeals included as "competitive" (a) a 1968 product of Sports Promotions in which baseball cards were required to be less than half the value of the package (A55, ¶¶ 96-97), (b) a 1970 Sports Promotions product package with cards at

ants' contracts and conduct not in relation to the market found by the District Court, in which Topps's product was "alone" (A86),[7] but in relation to a larger market in which "[s]everal non-confectionary product licenses [had] been issued by the Association" (A32).

Thus, the Court of Appeals set aside the controlling factual findings of the District Court, including the market definition which it assumed to be correct. And it did so without acknowledgement or explanation.

The Federal Rules of Civil Procedure (Rule 52(a)) provide:

> Findings of fact [made by a District Court Judge] shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses.[8]

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6. (Cont'd)

eight cents each (Plaintiff's Exhibit 66), (c) Madaras and Asco products with cards at five cents each (Topps Exhibits 6058 and 6075), (d) Linnett products with cards at ten cents each (Plaintiff's Exhibit 94) and (e) Beatrice Foods, ITT Continental and Kellogs products specifically excluded from the market by the District Court (A48, ¶ 62; A56, ¶ 101). None of these "competitors" were permitted under their Association licenses to approach Topps's price per card and, thus, to be "competitive" with Topps under Findings 129 and 130 of the District Court.

7. The opinion of the Court of Appeals contains no analysis of the market found by the District Court (baseball cards sold alone or with low-cost premiums) in which Topps had a 100% share maintained by (a) exclusive contracts, (b) a policy of objecting to licenses with low-cost non-confectionary products (A56, ¶ 102) and (c) an agreement to pay royalties to the Association providing it with a disincentive to license competitors (A57, ¶ 106; A78-79).

8. The "clearly erroneous" standard applies to the product market definition and the effect of defendants 'conduct on competition. *International Boxing Club of New York, Inc. v. United States*, 358 U. S. 242, 249-51 (1959).

This Court has held that the Court of Appeals cannot set aside a finding as "clearly erroneous" unless "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U. S. 100, 123 (1969); *United States v. United States Gypsum Co.*, 333 U. S. 364, 395 (1948). Surely, if a "definite and firm conviction" is required for reversal, that conviction should be stated, not denied. Also, the Court of Appeals should show that the finding is "clearly erroneous" in some demonstrable regard.

The proper and consistent application of the "clearly erroneous" standard is essential to the integrity of the judicial system. The efforts of a conscientious District Judge go for naught if a Court of Appeals is free to alter the controlling facts 180 degrees without explanation. The parties, and others, can obtain no guidance from opinions which do not explain their reasoning and are internally inconsistent.

Adherence to the "clearly erroneous" standard by Courts of Appeals can be assured only if this Court grants certiorari in egregious cases. Certiorari is warranted in the instant case to establish that a Court of Appeals *may not* set aside findings of a District Court (and, in particular, crucial findings like the product market in an antitrust case) after it has stated that it assumes them to be correct.

2. The Court Should Grant the Petition to Reestablish That It Is Not Necessary to Exclude All Potential Competition to Violate Section 2 of the Sherman Act.

The Court of Appeals said that, because Topps and the Association "did not have the power to exclude *all* competition from the relevant market", there was no violation of Section 2 (A32) (emphasis added). As stated, that is manifest error, since this Court has held that "power and intent to exclude *all* competitors" is not es-

sential to a Section 2 violation. *American Tobacco Co. v. United States,* 328 U. S. 781, 789 (1946). Consequently, one would expect to find that the Court of Appeals did not really mean what it said. However, a careful reading of the Court of Appeals' opinion shows that it did mean exactly what it said. It exonerated the defendants solely because they had left open a theoretical avenue for entry, even though that avenue was of no practical significance.

The avenue of entry which the Court of Appeals relied upon was the potential for competition with Topps in signing individual player contracts. The theory was that a potential competitor could accumulate publicity rights from enough new minor league players to make up a marketable collection of trading cards when those players finally reached the majors.

But theory is one thing; practice is another. In attempting to sign up players, the would-be entrant would be competing with Topps for player contracts. Topps would start that competition with an enormous head start, based on its long-term contracts with 100% of the major and minor leaguers, and the Association's endorsement. Because the turnover in the major league ranks is slow, any significant accumulation of player contracts by the competitor would inevitably be a long time in coming.

Two expert witnesses analyzed the potential for entry in this manner, each making the arbitrary assumption that the would-be entrant would enjoy equal success with Topps in signing both minor and major leaguers. On this basis, both experts calculated that after six or seven years (but not before) the entrant *might* be in a position to enter the market with a product with cards depicting 150 major league players. At that time, however, Topps would still be offering a far superior product depicting about 570 players. Fleer's expert testified that the assumption of

equal success in signing players was "very sanguine" and that he did not think any rational businessman would attempt the effort (Tr. 702, 733-737).

The District Court, which heard both experts, agreed with Fleer's expert, saying:

> 92. The assumption that a competitor would compete evenly with Topps for player contracts is an optimistic one. Topps is an entrenched competitor, and its influence with the players is considerable. A competitor facing six (and likely more) years of uncertainty before it can market even an inferior trading card product is likely to take its capital and its energies elsewhere.

The Court of Appeals recognized that "a program of head to head competition might take six or seven years to bear fruit" [9] but nonetheless concluded that a "rival manufacturer could compete head to head with Topps by seeking licenses with minor league players" (A24). The Court held that there could be no antitrust violation because market entry in this fashion was theoretically possible, even though wholly impractical.[10]

This Court has previously considered a restraint which prevented all practical but not all possible entry into a

9. Topps argued to the Court of Appeals that a competitor might enter the market in less than six years by avoiding both Topps's contracts and the Association's commercial authorizations. Topps suggested that the competitor might contract with minor league players to sell cards with a product other than chewing gum or candy. This argument would have had no weight with the District Court because that Court found that cards sold with such products would command only a small slice of the market (A77) and that the Association would actively oppose such an effort (A76 n. 6). The Court of Appeals ignored the argument.

10. The Court of Appeals said that the six-to-seven year delay was "simply a function of modern day baseball" (A24). But the

market. In *United States v. Terminal Railroad Association of St. Louis*, 224 U. S. 383 (1912), the defendants had exclusive control of all existing railroad switching facilities in St. Louis. There was no legal restraint against the construction of competing facilities, but topographical conditions made this impractical. This Court held:

> "[W]hen, as here, the inherent conditions are such as to prohibit any other reasonable means of entering the city, the combination of every such facility under the exclusive ownership and control of less than all of the companies under compulsion to use them violates both the first and second sections of the [Sherman Act]. 224 U. S. at 409." [11]

This Court must grant this petition to reestablish the principle of *Terminal Railroad Association* that a restraint which forecloses all practical entry violates the antitrust laws, even though a theoretical but impractical avenue of entry remains open.

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10. (Cont'd)

structure of modern day baseball does not require Topps to use contracts that obligate the player for five major league seasons rather than five seasons (A36, ¶ 13; A59, ¶ 112); to write these contracts with staggered expirations (A36, ¶ 12); and to renew them every other year (A36, ¶ 13). And it does not require the Association to agree not to interfere with Topps in return for a percentage of Topps's sales.

11. Similarly, in *Hecht v. Pro-Football, Inc.*, 570 F. 2d 982 (D. C. Cir. 1977), *cert. denied*, 436 U. S. 956 (1978), the Circuit Court for the District of Columbia held that an exclusive lease to a stadium would be an antitrust violation "if duplication of the [stadium] would be economically unfeasible and if denial of its use inflicts a severe handicap on potential market entrants." 570 F. 2d at 992.

3. This Court Should Grant the Petition to Establish That Accumulations of Exclusive Publicity Rights Are Not Exempt From the Antitrust Laws.

The Court of Appeals' decision sets up a conflict between the antitrust laws and the developing common law right of an individual to control the use of his name and picture. Topps's monopoly rests on two accumulations of such rights, the accumulation represented by Topps's player contracts and the accumulation represented by the Association's commercial licenses. The 1968 Agreement produced a combination controlling 100% of the publicity rights of 100% of the players. The combination used this control to exclude all meaningful competition. The District Court, applying general principles of antitrust law, held that this was a combination in restraint of trade in violation of Section 1, and that the resulting monopoly violated Section 2.

In reversing the District Court and exonerating the combination and the monopoly, the Court of Appeals rejected normal antitrust analysis. It started with the obvious and uncontested proposition that publicity rights are exclusive. That is to say, each player has the legal right either to exclude others from using his name or his picture or to license others to do so on an exclusive basis. *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F. 2d 866 (2d Cir.), *cert. denied*, 346 U. S. 816 (1953).[12] The

12. Since the publicity rights of baseball players were established in *Haelan Laboratories*, similar rights have been conferred on a wide range of sport and entertainment celebrities. The rights have also been the subject of extensive academic and journalistic comment. *See, e.g.*, Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 Nw. U. L. Rev. 553 (1960); Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 Law & Contemp. Prob. 326 (1966); *Note, The Right of Publicity—Protection for Public Figures and Celebrities*, 42 Brooklyn L. Rev. 527

Court of Appeals' next step was to draw an analogy between these common law publicity rights and other exclusive intangible property rights; to wit, patents, copyrights and trademarks. Finally, the Court of Appeals cited *L. G. Balfour Co. v. FTC*, 442 F. 2d 1 (7th Cir. 1971) for the proposition that "mere accumulation of trademarks does not constitute unlawful monopolization" from which it concluded that the accumulation of publicity rights is entitled to the same treatment (A22).

Thus, the Court of Appeals held that accumulations of exclusive publicity rights enjoy some form of immunity to the antitrust laws and that this immunity extends to combinations of accumulations. We ask this Court to grant this petition and to establish that there is no such immunity.

We say that there is no such immunity because the Court of Appeals' decision is clearly wrong in at least two respects:

> (1) Publicity rights are not analogous to patents and copyrights. Patents and copyrights are statutory, created to benefit the public and are limited in time. Publicity rights are common law, created to benefit only the individual and are not so limited. Thus, there is no basis for extending the treatment of

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12. (Cont'd)

(1976); Comment, *Transfer of the Right of Publicity: Dracula's Progeny and Privacy's Stepchild*, 22 U. C. L. A. L. Rev. 1103 (1975); Treece, *Commercial Exploitation of Names, Likeness and Personal Histories*, 51 Texas L. Rev. 637 (1973); Felcher and Rubin, *Comment, The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 Yale L. J. 1125 (1980); Kleinfield, Publicity Rights of the Stars: The Living and the Dead, *N. Y. Times*, Nov. 22, 1981, at F-9; The Licensing of Famous Names to Sell Products Is a Booming Field These Days, *Wall St. J.*, Dec. 2, 1974, at 32, Col. 1.

patents and copyrights to publicity rights, particularly in view of the established rule that "immunity from the antitrust laws is not lightly implied." *United States v. Philadelphia National Bank*, 374 U. S. 321, 348 (1963).

(2) Contrary to the opinion of the Court of Appeals, *Balfour* did not confer antitrust immunity on the accumulation of either trademarks or common law exclusive rights. Its holding was precisely the opposite, *i.e.*, that Balfour's accumulation of exclusive statutory and common law rights to sell fraternity insignia was monopolization under the standards of Section 2 (442 F. 2d at 9, 14) and that it was not immune from the antitrust laws:

> "Even though all fraternities may have full common law and statutory rights in their insignia and that the exclusive dealing contracts between [Balfour] and each fraternity may be legal assignments of those rights, [Balfour's] illegal accumulation and enforcement of these agreements cannot, because of that, be immunized from the antitrust laws." 442 F. 2d at 15.

Thus, the Court of Appeals created a new exemption from the antitrust laws in direct conflict with the Seventh Circuit decision on which it relied.

This Court has previously resolved a conflict between the right of publicity and the right of the press under the First and Fourteenth Amendments. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U. S. 562 (1977). It should now resolve the conflict created by the Court of Appeals between that right and the antitrust laws.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS,
THIRD CIRCUIT.

Nos. 80-2537 to 80-2539 and 81-1104.

FLEER CORPORATION, Appellant in Nos. 80-2537, 81-1104 and Appellee in Nos. 80-2538, 80-2539,

v.

TOPPS CHEWING GUM, INC., et al., Major League Baseball Players Association,

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Topps Chewing Gum, Inc., Appellee in Nos. 80-2537, 81-1104 and Appellant in No. 80-2538,
Major League Baseball Players Association, Appellee in Nos. 80-2537, 81-1104 and Appellant in No. 80-2539.

Argued May 18, 1981.
Decided Aug. 25, 1981.

Bernard G. Segal (argued), James D. Crawford, Arlene Fickler, David G. Battis, Schnader, Harrison, Segal & Lewis, Philadelphia, Pa., Sidney Harris, New York City, Obermayer, Rebmann, Maxwell & Hippel, Philadelphia, Pa., for Topps Chewing Gum, Inc.

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Before GIBBONS, HUNTER and GARTH, Circuit Judges.

OPINION OF THE COURT

JAMES HUNTER, III, Circuit Judge:

This case involves the production and sale of major league baseball trading cards in alleged violation of sections 1 and 2 of the Sherman Act. 15 U.S.C. §§ 1 & 2 (1976). Appellee, Fleer, commenced suit in 1975 against appellants, Topps, and the Major League Baseball Players Association (MLBPA), claiming that appellants excluded effective competition in the sale of baseball trading cards through a series of interlocking exclusive licensing contracts. The contracts at issue were Topps' individual licensing agreements with each player in the major and minor leagues; the commercial authorization contract between the MLBPA and the individual major league players; and a 1968 agreement between Topps and the MLBPA which constituted a renegotiation of players' earlier contracts with Topps. The district court found these interlocking agreements to foreclose competition in all but a small portion of the relevant market. Nominal damages were awarded against Topps, but the district court granted injunctive relief that required Topps to assign its exclusive publicity rights to the MLBPA. In turn, the Association was to grant at least one nonexclusive license for the production of baseball cards before October 1, 1981. Because we hold that the three agreements in question were neither unreasonable restraints of trade under section 1 of the Sherman Act, nor monopolization of the relevant market under section 2, we will reverse the judgment of the district court.

I. *FACTS*

A. *The Parties*

Appellee, Fleer Corporation, manufactures and sells bubble gum and other confections. In the late 1950's

and early 1960's Fleer sold baseball trading cards in combination with gum as well as other non-sport (editorial) trading cards.[1] Prior to 1966, Fleer had individual licensing agreements with several major league baseball players that authorized the production and sale of baseball trading cards. Fleer sold all of these contract rights to Topps in 1966.

Appellant, Topps Corporation, also manufactures and sells bubble gum, candy, and novelties.[2] In 1956, Topps acquired the exclusive license to a large number of baseball players' photographs and statistics through an agreement with Bowman Gum Company. Topps is presently the only seller of baseball cards sold in combination with bubble gum in the United States.

The MLBPA is a labor organization whose primary responsibilities are to negotiate, administer, and enforce collective bargaining agreements between the players and the team owners. The Association is also the players' exclusive marketing agent for publicity rights when these rights are sold as part of a group series.

B. *Background*

The products at issue are baseball trading cards: the familiar 2½" by 3½" cards with the name and picture of one player, in team uniform, on the front, and his career statistics and personal information on the back.[3]

1. Fleer's best known products are "Double Bubble" bubble gum and "Gatorgum." Fleer's editorial cards depicted various Hollywood personalities and fictional characters.

2. Topps' best known product is Bazooka bubble gum, but the company also produces "Krypton Gum," "Garbage Candy" and a variety of editorial trading cards. Topps also markets football, basketball and hockey cards which, like baseball cards, are sold only during the season in which the sport is played.

3. Baseball trading cards, along with other sports trading cards, are marketed either in a trading pack consisting of 14 baseball

Baseball trading cards were first sold in conjunction with chewing tobacco and cigarettes at the end of the nineteenth century and were included later as a treat with chewing gum and other confections. Since first introduced, baseball trading cards have developed quite a following among baseball fans. As the district court noted:

> For decades, they [baseball cards] have been an important and distinctive part of many childhoods . . . cardboard, wallet-size pictures of active major league players have existed for generations. Even if the product was a casual idea of a long-forgotten promoter in the 1880's, and even if there are hundreds of variations and substitutes that might exist, the concept is now so embedded that baseball cards literally define themselves.

Fleer Corp. v. Topps Chewing Gum, Inc., 501 F.Supp. 485, 497 (E.D. Pa. 1980).

Topps began to market baseball cards with bubble gum in 1949. At that time, Bowman Gum Corporation had a predominate position in the baseball card market by virtue of its numerous publicity contracts with major league players.[4] These contracts gave Bowman the ex-

3. (Cont'd)

cards and a piece of gum or in "Rack Packs" or vending packs in which up to 500 baseball cards are sold alone. The majority of cards cover a single player. Some, however, depict various groups such as, All-Stars, rookies, and entire professional teams. In addition, other cards picture team managers and trainers as well as "check list" cards which permit fastidious collectors to order their acquisitions.

4. In the late 1940's and early 1950's there were many competing bubble gum manufacturers in the trading card market. They included Bowman, Fleer, Leaf Chewing Gum, Philadelphia Chewing Gum, and Topps.

clusive right to use a player's photograph in connection with the sale of gum. In 1953, when Topps introduced trading cards depicting players under exclusive contract to Bowman, the latter, through its parent corporation, commenced suit for infringement. The Second Circuit, in *Haelan Laboratories v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816, 74 S.Ct. 26, 98 L.Ed. 343 (1953), held that Topps' publication both infringed on Bowman's contractual rights and violated the players' exclusive right to control their own publicity. Topps was forced to withdraw the infringing cards.

Three years after this decision Topps purchased all of Bowman's player contract rights, and Bowman left the trading card market altogether. In addition, during this period, Topps began a vigorous program of signing individual standard form contracts with thousands of both major and minor league baseball players. Under these agreements, each player granted Topps an exclusive right to publish his name, picture, signature and biographical sketch "to be sold either alone or in combination with chewing gum, candy and confection or any of them." As consideration, Topps guaranteed the player a lump-sum payment of $125 for each season in which either his picture was used or the player was an active member of a major league club. These contracts ran until Topps had made five years of payments to the individual player.

In 1965, the Federal Trade Commission filed an administrative complaint against Topps claiming that its aggregation of individual exclusive contracts violated section 5 of the FTC Act. 15 U.S.C. § 45 (1976); *Topps Chewing Gum, Inc.*, 67 FTC 744 (1965). After a hearing an examiner ruled against Topps, but on appeal the Commission reversed. It held that Topps' exclusive license to publish players' photographs and statistics on trading cards was limited in scope and hence lawful. The Com-

mission stressed that Topps' limited exclusive licenses did not prohibit the sale of trading cards with other low cost products such as marbles, cookies, or powdered soft-drinks. Therefore, competition for baseball trading cards existed when the cards were sold in conjunction with products other than gum. *Id.* at 859.

Until the FTC's decision, Fleer competed with Topps by obtaining a similar aggregation of player publicity licensing agreements. Indeed, in the early 1960's Fleer sold two sets of trading cards known as "Baseball Greats." After the FTC's 1965 ruling, however, Fleer abandoned the baseball market and focused on other sports and editorial cards. In 1966, it sold all its player publicity licenses to Topps for $395,000.

Since 1966, Topps has accumulated the vast majority of exclusive licensing agreements with the players. By virtue of these contracts, Topps is the sole manufacturer of baseball trading cards sold in conjunction with bubble gum. Since 1966, however, baseball trading cards have accompanied a variety of other non-confectionary products. This was due, in large measure, to the development of the MLBPA.

C. *Development of the MLBPA and Group Licenses*

When the MLBPA hired its first executive director, Marvin Miller, in 1966, the Association suffered from an acute lack of funds. In order to raise operating capital, Miller developed the idea of a group licensing program whereby all of the players would authorize the Association to market their pictures and signatures when they were distributed as part of a group series. The first such group license was granted to Coca-Cola. It called for a series of 500 player pictures to be placed on the underside of bottlecaps. The royalties from this project funded the operating expenses of the Association and solved the

immediate fiscal crisis. Although Miller planned to terminate the program, the players liked the extra income and persuaded Miller to retain the system even after the Coca-Cola agreement had expired.

Under this group licensing program, which became known as the commercial authorization contract, each player remained free to market the personal rights to his name, likeness, and signature when used individually, but only the MLBPA could contract for the players as a group. The players were not required to sign the commercial authorization contract, but most did.[5] From 1966 to 1975, the MLBPA entered into group licensing contracts with Kellogg, Sports Promotions, Milk Duds, and ITT Continental Baking among others. The number of players included in the licensing agreement has varied. Some contracts (Coca-Cola and Kellogg) covered all major league players; others extended to "not less than 72, and not more than 300."

Topps' trading cards, along with various bat and glove manufacturers, were not subject to the group licensing restrictions of the commercial authorization contract. This exemption existed because under the terms of the commercial authorization program, the MLBPA group licensing agreement extended only to publicity rights that had not already been conveyed.[6] Since all players were under

5. Group licenses were negotiated by Marvin Miller or the MLBPA's licensing subagent, subject to the approval of the Association's executive board or licensing committee. These commercial authorization contracts lasted three years and renewals were obtained by the team's player representative to the Association.

6. The operative language in the commercial authorization contract which excluded Topps' rights from the coverage of the MLBPA stated: "Any group licensing contract entered into with any individual company for the promotion of its products, shall exclude players who are committed by contract to competitive products." Hence, the MLBPA was without authority to grant any group licenses for trading cards sold alone or with gum.

exclusive contract to Topps by the time they reached the majors, the Association could not license publicity rights for baseball cards sold alone, or in combination with gum, candy or other confection.

After the Coca-Cola project resolved the Association's immediate funding crisis, the MLBPA initiated membership dues to finance operating expenses.[7] Thereafter, all commercial authorization royalties were distributed directly to the players. The Association, for administrative purposes, did receive the licensing income, but merely as a conduit that distributed all of the licensing revenue to the players. These royalties were never used to cover MLBPA expenses.

D. *The 1968 Agreement*

In 1966, when Marvin Miller first learned of the Topps' individual player licensing agreements, he met with Joel Shorin, president of Topps, and attempted to increase the players' compensation under these agreements. Topps rebuffed Miller's attempts to renegotiate, stating that since Fleer had sold its rights in 1966, Topps had all major league players under contract and in short, Shorin told Miller: "I don't see your muscle." In an attempt to gain some bargaining leverage, Miller persuaded the players, through the MLBPA's executive board, to adopt a policy of not signing renewals to Topps' individual licensing agreements.

In addition, Miller attempted to enhance his bargaining position by offering Fleer an opportunity to purchase similar exclusive publicity rights. In 1968, Miller presented Fleer with a proposal that, for $600,000, would give

7. The MLBPA began a voluntary "Dues Checkoff" system in 1967. Under this agreement the major league teams withheld an amount from each player's salary for each day of his service, and then remitted that amount to the MLBPA.

Fleer exclusive rights, beginning in 1973, to market baseball cards sold with gum for 80% of the baseball players. Under this proposal, Fleer would not have to pay any money until 1973 and even then no funds were due unless Miller delivered 80% of the players' exclusive licenses. Alternatively, the Association asked Fleer if it would be interested in the immediate rights for all players' trading cards sold with a product other than gum. Fleer rejected both offers, claiming they were only interested in cards sold with gum, and that 1973 was too far in the future.

Meanwhile, the Executive Board's decision to adopt a policy of non-renewal began to produce results. The players complied with the decision and refused to sign extension agreements with Topps. When this occurred Miller obtained concessions in the scope of Topps' individual agreements and the remuneration offered to the players. On November 18, 1968, the Association reached a new agreement with Topps that modified all then existing individual agreements with the players.

The terms of the 1968 agreement increased the players' lump sum license payments from $125 to $250 per year. In addition, if the revenues collected exceeded this amount, each player received a pro rata share of 8% of Topps' sales up to four million dollars and 10% of Topps' sales over four million. If the Association were to be presented with a competitive licensing proposal that might infringe on Topps' exclusive right to baseball cards sold alone or with gum, Topps promised to notify the Association as to whether it would release its rights. Topps also reserved a right of first refusal as to any merchandising proposal that included player pictures larger than 5″ × 7″. In return, the MLBPA promised it would not "interfere with Topps' contracts, its procurement of such contracts or its policy" for eight years. Under the 1968 agreement, all publicity royalties went to the players on a pro rata basis.

In 1974, a detail was changed so that Topps paid any excess over the $250 minimum to the MLBPA. The Association, again acting solely as a conduit, distributed these amounts in the same fashion as the licensing revenues under the commercial authorization contracts.

After the signing of the 1968 agreement, the MLBPA granted several licenses to merchandisers for the production and sale of baseball trading cards. These licenses covered the sale of baseball cards with cereals, candy, and novelties. The MLBPA also licensed the sale of trading cards with cheap non-confectionary novelties, often referred to as "sham products." Topps objected to such licenses in principle because their marketing was tantamount to the sale of baseball cards alone, and hence an infringement of Topps' exclusive rights. Nevertheless, in 1969 the MLBPA granted Sports Promotions, Inc., a license to market trading cards with cheap novelty rings, iron-on patches, and similar novelties so long as the value of the novelty represented half of the total retail value. In the spring of 1970, Topps learned of this promotion and complained to the Association that its rights had been infringed. The MLBPA disagreed and managed to secure a letter agreement in which Topps did not object to the promotion for one full baseball season. The MLBPA issued several other trading card licenses during the 1968-1976 period; some of these were also over the objection of Topps.[8]

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8. In 1972-73 the MLBPA granted a license to Madaras, Inc. and Pasco, Inc. of Winona, Minnesota, under which those companies sold various baseball novelties including picture packs. Topps objected to these sales but the MLBPA persuaded Topps to waive its rights. In addition Topps waived any objections to a proposal from Pro-Stars, Inc. of Canada, which included the distribution of player postcards.

E. *Fleer's 5" × 7" Proposal*

In 1974, Fleer made an attempt to re-enter the baseball trading card arena by submitting a written proposal to the MLBPA seeking the publicity rights to market 5" × 7" stickers, patches, cards, iron-ons, and photographs for sale with or without bubble gum. Miller received the proposal but admonished Fleer that sales with gum could not be included because of Topps' rights and that sales of decals and iron-ons had already been licensed to another company, Seeko. Fleer made these changes and submitted a revised proposal.

Because Fleer's offer covered the sale of 5" × 7" patches and cards, Topps' had a right of first refusal under the 1968 agreement. Joel Shorin, President of Topps, later advised Miller that Topps would not exercise its right of first refusal on Fleer's offer. In addition, however, Shorin counseled that Fleer's proposal was probably not worthwhile. Topps' prior experience with baseball novelties indicated that these items tended to stay on the shelf and thereby inhibited retailers from purchasing other baseball related items. Shorin discussed the possibility that Fleer's product might depress the sales of trading cards and decrease the players' royalties from trading cards because of depressed sales. No one, however, asked the Association to reject Fleer's proposal. (Joint Appendix at 542-43).

Miller presented both Fleer's proposal and Topps' criticism of it to the players' executive board for its consideration. The Board unanimously rejected Fleer's offer fearing that it might decrease their royalties from Topps. In addition, Fleer's offer guaranteed only $25,000 in royalty payments but projected over one million in annual sales. The executive board was skeptical of marketing plans that offered little guaranteed payments with

promises of windfall royalties from as yet unrealized sales.

By April of 1975, Fleer had dropped the idea of a 5″ × 7″ proposal. Miller suggested several changes that might secure the Board's permission to license the product, but Fleer declined to modify its stance. Fleer's president, Donald Peck, met with Joel Shorin on April 17, 1975, and threatened suit unless Topps granted Fleer the rights to sell player pictures on stickers, stamps, and decals. Shorin refused and Fleer approached the MLBPA about joining in its suit against Topps. The Association declined and Fleer filed a complaint in the Eastern District of Pennsylvania naming the MLBPA as a co-conspirator with Topps in a suit for violation of sections 1 and 2 of the Sherman Act.[9]

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9. 15 U.S.C. § 1 (1976) provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 (1976) provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

II. *DISTRICT COURT'S OPINION*

A. *Relevant Market*

The district court's first task was to determine the relevant market by which to judge the alleged violations of the Sherman Act. Guided by the criteria outlined in *Brown Shoe Co. Inc. v. United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 1523, 8 L.Ed.2d 510 (1962), the district court found the relevant market for antitrust purposes to be: "pocket size pictures of active major league baseball players, sold alone or in combination with a low cost premium, at a price of 15 to 50 cents." *Fleer*, 501 F.Supp. at 504. In reaching this finding, the district court stressed the unique history of baseball cards and the public's awareness of baseball trading cards as a discrete market.

B. *Section 1 Claim*

Within this narrowly defined market, the court began its analysis of Fleer's section 1 claim by noting that to enter the baseball trading card market, one must either compete directly with Topps for an aggregation of exclusive player licenses or seek a group license under the MLBPA's commercial authorization program for the right to market baseball cards with a non-confectionary premium. The court found that direct competition with Topps for individual player contracts was all but foreclosed because Topps had exclusive contracts with every individual major league player. In addition, under this method of competition, only the minor league players—who had not signed with Topps and were not yet eligible for the MLBPA—were in a position to grant licensing contracts. It would take several years of contracts with the minor league players before enough reached the majors and created an alternative series of baseball trading cards. Hence, a rival manufacturer could not market a competitive product for several years.

The district court went on to find that competition for trading cards sold with non-confectionary goods was shut off by the Topps—MLBPA agreement of 1968. To obtain a license for non-confectionary products a competitor must submit a proposal under the commercial authorization program of the MLBPA. But the district court found that the Association refused to grant licenses for the sale of baseball cards with low cost premiums for two reasons. First, the MLBPA feared that licensing the sale of baseball cards with low cost or "sham" products would be tantamount to sales of baseball cards alone, and hence a violation of Topps' rights. Second, the court found that the Association was reluctant to license competing baseball card products for fear of diminishing Topps' bubble gum royalties. The foreclosure of the market was insured by the royalty provisions of the 1968 agreements, as well as by the MLBPA's promise not to interfere with Topps' acquisition of exclusive contracts with minor league players or renewal contracts with major league players.

The district court viewed this network of contracts—the 1968 agreement, the MLBPA commercial authorization program, and Topps' license agreements with the individual players—as an unreasonable restraint of trade in violation of section 1 of the Sherman Act.

C. *Section 2 Claim*

The district court then turned to Fleer's section 2 claim and held that "[f]or virtually the same reasons the defendants have been found to have violated § 1 of the Sherman Act, they are also liable under § 2." *Fleer*, 501 F.Supp. at 511. Specifically, the court found the defendants involved in a conspiracy to monopolize the baseball trading card submarket. The court did not address the issue of the appellants' specific intent to monopolize, but held instead that appellants' actual exercise of monopoly power supported a finding of conspiracy to monopolize.

D. *Damages and Injunctive Relief*

While in the district court's view Fleer proved the fact of injury sufficient to confer standing, the court held that it failed to prove the amount of damage caused by the anticompetitive restraint with any specificity. Hence, it awarded nominal damages of one dollar, but fashioned a broad program of equitable relief in an effort to place Fleer in essentially the same position it should have been before the suit: a company "with a fair opportunity to enter the baseball card market, facing both success and failure as possible outcomes." *Id.* at 513.

In order to achieve this purpose, the court fashioned an injunction that prohibited Topps from: a) enforcing the exclusivity clause in its agreements with the individual baseball players or entering into any new exclusive agreements with the players; b) entering into any renewal contracts with players for longer than two years; and c) enforcing its right of first refusal on competitive bids submitted to the MLBPA.

The MLBPA was required, in turn, to grant at least one non-exclusive license to market baseball trading cards either alone or with a non-confectionary premium before October 1, 1980. In addition, at least one group license was to be given to the Fleer corporation, if they matched the offer of any competing merchandiser. The MLBPA was enjoined from considering any revenue they might derive from Topps' products when making future decisions on whether to grant group licenses of baseball card rights.

Both Fleer and Topps appealed. Fleer seeks to expand the injunction to bar Topps from the baseball card market for at least one season, and to require Topps to deal with the Association rather than through its exclusive player agreements. In addition, Fleer seeks to have the district court's award of nominal damages reversed and the case remanded for further findings on the damages issue. Topps appeals the findings of liability, damage

award, and injunctive relief. We have appellate jurisdiction to review the district court's judgment under 28 U.S.C. § 1292(a)(1) (1976).[10]

III. *DISCUSSION*

A. *Section 1 claim*

Read literally, section 1 of the Sherman Act proscribes every agreement "in restraint of trade." 15 U.S.C. § 1 (1976). Yet, as Justice Brandeis recognized in *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918), "[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." *Id.* at 238, 38 S.Ct at 243. Consequently, the Supreme Court has developed a "rule of reason" standard which proscribes only those agreements that restrain trade unreasonably. *See Standard Oil Co. v. United States*, 221 U.S. 1, 60, 31 S.Ct. 502, 515, 55 L.Ed. 619 (1911); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1344 (3d Cir. 1975). The rule of reason analysis scrutinizes the purpose and competitive effect of each agreement to determine its lawfulness. *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13, 98 S.Ct. 2864, 2873, 57 L.Ed.2d 854 (1978) (purpose and effect are linked disjunctively in antitrust analysis); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 691, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978) (the effect of the restraint on competition is important for rule of reason analysis).[11]

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10. The district court reserved the issue of attorneys' fees.

11. The Court has also, for certain evidentiary and administrative purposes, identified certain *per se* restraints "which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958). Unless the particular restraint falls within one of these *per se* categories its legality must be examined

In this circuit, to sustain a claim under section 1 the plaintiff is required to prove:

> (1) that the defendants contracted, combined, or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy.

Martin B. Glauser, 570 F.2d at 81.[12] For purposes of our review, we assume but do not decide the correctness of the district court's definition of the relevant product market.[13]

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11. (Cont'd)

under the rule of reason analysis. *Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 82 (3d Cir. 1977), *cert. denied*, 436 U.S. 913, 98 S.Ct. 2253, 56 L.Ed.2d 413 (1978).

12. Fleer contends that the cumulative effect of all three agreements—the 1968 contract, the commercial authorization program, and Topps' individual contracts with the players—was to restrain trade unreasonably in the baseball card market. Technically, only the 1968 agreement, between named defendants MLBPA and Topps, could support a section 1 violation because the court could only make a finding of concerted action involving these parties. *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968); *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068, 1074 (3d Cir. 1978). All other agreements involved each major league player, none of whom were named as defendants in this action. Consequently, our review should be limited to evaluating the purpose and effect of the 1968 agreement. Nevertheless, we will review the commercial authorization program and Topps' individual licensing agreements in order to evaluate Fleer's contention that the combined effect of these interlocking agreements constituted a violation of section 1.

13. The definition of a relevant product market is a necessary element of either a section 1 or 2 violation. *Columbia Metal Culvert Co. Inc. v. Kaiser Aluminum Corp.*, 579 F.2d 20, 26-27 (3d

The district court correctly characterized this restraint as one to be examined under the rule of reason.[14] The criteria for scrutinizing the legality of a restraint under the rule of reason were best catalogued by Justice Brandeis in *Chicago Bd. of Trade:*

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

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13. (Cont'd.)
Cir.) *cert. denied*, 439 U.S. 876, 99 S.Ct. 214, 58 L.Ed.2d 190 (1979). A finding of liability under section 1—except where cases fall within the *per se* category—presupposes the determination of a market place by which to evaluate the restraint's effect on competition. *United States v. E. I. du Pont De Nemours & Co.*, 351 U.S. 377, 395, 76 S.Ct. 994, 1007, 100 L.Ed 1264 (1956). But the relevant market inquiry under sections 1 and 2 is not identical. As Judge Adams distinguished in *Columbia Metal*, "The § 2 market definition looks to the existence of competitors as evidence of countervailing power which would preclude monopolization. § 1, in contrast, is concerned with patterns of competition as a means of judging whether a restraint of trade is unreasonable." *Columbia Metal*, 579 F.2d at 27 n.11. *See also American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249 n.51 (3d Cir. 1975).

14. At trial, Fleer argued that Topps' and the Association's activity amounted to a group boycott and was consequently *per se* illegal under the holding in *Klor's Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959). Since there has been no concerted refusal to deal by a group of competitors in that business, the facts of this case do not support a group boycott claim. *Fleer*, 501 F.Supp. at 509.

Id. at 81. In this case the "facts peculiar to the business," and the "history of the restraint" are crucial. Specifically, each player's exclusive right of publicity and its effect on the trading card market, is central to our analysis.

The exclusive right of major league baseball players to control the form and frequency of their commercial publicity has been long established. Ironically, the landmark case in this area, *Haelan Laboratories, Inc. v. Topps Chewing Gum*, 202 F.2d 866 (2d Cir. 1953), involved the same defendant and a similar dispute over exclusive rights to sell baseball trading cards. In that case, plaintiff, a trading card manufacturer, had signed exclusive licensing agreements with several major league baseball players. Topps, a rival trading card manufacturer at the time, deliberately induced these players to grant overlapping trading card rights to Topps. Haelan sued to enjoin Topps' actions and have the players' subsequent assignment of publicity rights declared void. The Second Circuit upheld Haelan's exclusive licenses and thereby established a new "right of publicity" independent of any privacy concepts which had constrained prior courts. *See* Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 Nw.U.L.Rev. 553, 570-601 (1960).

In so doing, the *Haelan* court held that a major league baseball player's right of publicity was both exclusive and assignable.

> We think that, in addition to and independent of that right of privacy . . . . a man has a right in the publicity value of his photograph, *i.e.*, the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made "in gross," *i.e.*, without an accompanying transfer of business or anything else . . . .
>
> This right might be called a "right of publicity." For it is common knowledge that many prominent

> persons (especially actors and ballplayers), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains, and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.

Id. at 868.

The Supreme Court has recognized such an exclusive right of publicity and analogized its effect to the protection afforded by the patent and copyright laws. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575-76, 97 S.Ct. 2849, 2857-58, 53 L.Ed.2d 965 (1977). In *Zacchini*, the Court held that petitioner's 30 second human cannonball act could not be filmed in its entirety by the local news media and then reproduced on the evening news. In so ruling the Court stated that, like copyright and patent laws, the right of publicity was " 'intended definitely to grant valuable, enforceable rights' in order to afford greater encouragement to the production of works of benefit to the public." *Id.* at 577, 97 S.Ct. at 2858 (citations omitted).

This circuit recognized the right of publicity not long after the landmark *Haelan* case. In *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 486 (3d Cir.), *cert. denied*, 351 U.S. 926, 76 S.Ct. 783, 100 L.Ed. 1456 (1956), we held that a prize fighter who licensed the motion picture rights to his prize fight retained a right of publicity over the television rebroadcast of the same movie. In upholding plaintiff's cause of action for damages against the television broadcaster, Judge Biggs stated:

> There are, speaking generally, two polar types of cases. One arises when some accidental occurrence rends the veil of obscurity surrounding an average person and makes him arguably, newsworthy. The other type involves the appropriation of the performance or production of a professional performer or entrepreneur. Between the two extremes are many graduations, most involving strictly commercial exploitation of some aspect of an individual's personality, such as his name or picture.

Id. (footnotes omitted).[15] It is against this backdrop that we examine the purpose and anticompetitive effect of the appellants' contracts, individually and as an interlocking network, on the baseball trading card market.

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15. Other circuits have applied the exclusive right of publicity to other professions. *See Memphis Development Foundation v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir.), *cert. denied*, — U.S. —, 101 S.Ct. 358, 66 L.Ed.2d 217 (1980) (exclusive right of publicity for an entertainer is not inheritable); *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 220 (2d Cir. 1978), *cert. denied*, 440 U.S. 908, 99 S.Ct. 1215, 59 L.Ed.2d 455 (1979) (right of publicity is assignable during public figure's lifetime); *Motschenbacher v. R. J. Reynolds Tobacco Company*, 498 F.2d 821, 825 26 (9th Cir. 1974) (race car driver's right of publicity enforceable even though his facial features are not identifiable); *Cepeda v. Swift and Company*, 415 F.2d 1205, 1206 (8th Cir. 1969) (baseball star's right of publicity assignable in its entirety).

The Supreme Court has identified several rationales for awarding entertainers and professional athletes a right of publicity:

> The rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would normally have market value and for which he would normally pay.

Zacchini, 433 U.S. at 576, 97 S.Ct. at 2858, *quoting*, Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 *Law & Contemp.Prob.* 326, 331 (1966).

In 1966, Topps began an assiduous program of obtaining exclusive license agreements with every major and minor league baseball player. Fleer attempts to distinguish these contracts from those upheld in the *Haelan Laboratories* case by emphasizing that Topps' present agreements involved all major league players and contained long terms with staggered termination dates. We are unpersuaded by such differences. Merely because Topps, through individual contracts with every minor league player, managed to obtain license agreements with all major league players does not make the aggregation of these contracts an unlawful combination in restraint of trade. *Cf. Automatic Radio Manufacturing Co. Inc. v. Hazeltine Research, Inc.*, 339 U.S. 827, 834, 70 S.Ct. 894, 898, 94 L.Ed. 1312 (1950) ("The mere accumulation of patents, no matter how many, is not unlawful."); *L. G. Balfour Company v. FTC*, 442 F.2d 1, 16 (7th Cir. 1971) (mere accumulation of trademarks does not constitute unlawful monopolization).[16] Fleer chose to leave the trading card market in 1966 and sold all its existing licensing agreements with major league players to Topps. That Topps has managed to retain those contracts and sign minor league players does not make these agreements, in and of themselves, unreasonable.

The accumulation of exclusive licenses was also addressed by this court in *Lawlor v. National Screen Service Corp.*, 270 F.2d 146 (3d Cir. 1959), *cert. denied*, 362 U.S. 922, 80 S.Ct. 676, 4 L.Ed.2d 742 (1960). In *Lawlor*, eight motion picture producers granted National Screen an exclusive license to manufacture and distribute promotional accessories for their first run films. Plaintiff, a competing distributor, contended that National Screen's

16. *See also Lawlor v. National Screen Service Corp.*, 270 F.2d 146, 154 (3d Cir. 1959), *cert. denied*, 362 U.S. 922, 80 S.Ct. 676, 4 L.Ed.2d 742 (1960) (mere accumulation of copyright licenses is not an antitrust violation).

accumulation of licenses prevented effective competition and hence violated the antitrust laws. This court held that an accumulation of exclusive licenses is not a violation of the Sherman Act because a rival film accessory distributor could always compete against National Screen for subsequent contracts with motion picture producers.[17] Similarly, in our case, Fleer or any other trading card manufacturer, may compete with Topps for minor league players or even persuade the present major league players not to renew their Topps' contracts. In both cases, the licenses involved products which do not compete against each other. Hence, their accumulation does not prevent a rival manufacturer from entering the market and does not operate as a restraint of trade.

In addition, Fleer admits that while it could compete against Topps for license agreements in the minor leagues, it would be several years before such a strategy produced a marketable product. But this argument simply identifies a characteristic of major league baseball, rather than an illegal restraint of trade. The length of time it takes for these minor league contracts to produce a marketable series of major league cards is a function of the minor league farm system in baseball, not an indictment of Topps' licensing agreements. Not all minor league players reach the majors and those fortunate few often wait many years for the opportunity. Such a system ensures that it will be several years before there is a large market for the cards depicting minor league players. Hence, Fleer's

17. The major film producers in *Lawlor* were under 5 year exclusive agreements to National Screen, similar to Topps' agreements with the players. In addition, the *Lawlor* court stressed that the plaintiffs, had never attempted to compete with National Screen by obtaining their own exclusive licenses from the film producers. *Lawlor*, 270 F.2d at 154. Similarly, although in the market until 1966, Fleer never attempted to compete directly with Topps for minor league players. Indeed, Fleer rejected a 1968 offer by Marvin Miller for 80% of the players' exclusive licenses by 1973.

claim that Topps' dominance precludes rapid entry into the market misses the mark. A rival competitor may not be able to obtain major league players already under contract to Topps, but it can still compete for player licenses in the same forum in which Topps secured its present licensing agreements: the minor leagues. That such a program of head to head competition might take six or seven years to bear fruit does not make Topps' agreements anti-competitive; it is simply a function of modern-day baseball, one which we are required to consider in any rule of reason analysis. *Chicago Bd. of Trade*, 246 U.S. at 238, 38 S.Ct. at 243.

After careful examination, Topps' exclusive licensing agreements cannot be said to restrain trade unreasonably. A rival manufacturer could compete head to head with Topps by seeking licenses with minor league players. The lag time required to enter the market with a competitive series of trading cards is due in significant measure to the structure of organized baseball. In addition, Topps' aggregation of licenses was enhanced by Fleer's sale of its player licenses in 1966.

The MLBPA's commercial authorization program was the second crucial link in the agreements among defendants which allegedly foreclosed competition in the trading card market. Far from being a restraint of trade, the commerical authorization agreement is pro-competitive. It allows the players to negotiate as a single entity with merchandisers and thereby set up a wide variety of baseball novelty items. If every potential retailer had to contract with each player individually for a group license, few licenses would exist. By streamlining the negotiation process the commercial authorization program allows for increased competition in the trading card market. Several agreements for the sale of trading cards with non-confectionary goods were consummated after the implementation

of a commercial authorization plan. The validity of such a common agent for the licensing of the players as a group has been established. *See K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1, 3 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045, 88 S.Ct. 761, 19 L.Ed.2d 838 (1968) (ASCAP, common agent for over 8,000 musicians, held not to be an agreement in restraint of trade). *See also Broadcast Music, Inc. v. Columbia Broadcasting System Inc.*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979).

The 1968 agreement between Topps and the MLBPA was the third link in appellants' agreements. The district court found that while the 1968 agreement was not anti-competitive on its face, when combined with the commercial authorization program and Topps' individual licenses, its effect was to foreclose all meaningful competition for baseball trading cards. The court reasoned that since Topps' individual licensing agreements precluded the sale of trading cards alone or in combination with a confection, the only remaining market for cards was to sell them with a low cost non-confectionary premium. Such competition was effectively closed, however, by the combined effects of the commercial authorization contract and the 1968 agreement. The commercial authorization program required any trading card series to be cleared through the MLBPA in order to obtain a group license. Yet, because the 1968 agreement tethered the players' royalties to a percentage of Topps' sales, the MLBPA was unwilling to grant licenses to products that might compete with Topps and thereby decrease any royalties. Hence, the district court found that "but for P-1, [the 1968 agreement] some low cost non-confectionary or other competitive item would have been licensed by the Association." *Fleer*, 501 F.Supp. at 509. There is no support in the record for this finding.

Aside from the 1968 contract, there is no evidence of concert of action between Topps and the Association. An

examination of licenses granted by the Association for the sale of trading cards with non-confectionary goods demonstrates that the fear of decreased royalty payments did not stop the Association from licensing products competitive with Topps. In 1968, the Association licensed Sports Promotions to sell baseball trading cards with a novelty ring. The license required that the novelty constitute one-half the value of the package's total cost so that it would not be considered a sham product, and hence an infringement on Topps' license to sell the cards alone. Such a license is competitive with Topps and does not run afoul of the antitrust laws.[18]

The 1968 Sports Promotions license was by no means unique. In 1970, over Topps' protest, the Association granted Sports Promotions a license to market 3-dimensional baseball cards in conjunction with inexpensive iron on patches. The MLPBA resisted Topps' attempt to stop the license and indeed, secured a letter in which Topps agreed to waive any claims it might have against Sports Promotions. The Sports Promotions license was discon-

18. The MLBPA's fear of trademark infringement is a legitimate concern in this context. The Sherman Act does not require a licensor to test the boundaries of trademark infringement when making decisions about licensing competitive products. As this court said in *American Motor Inns:*

> In a rule of reason case the test is not whether the defendant adopted the least restrictive alternative. Rather the issue is whether the restriction actually implemented is "fairly necessary" in the circumstances of the particular case or whether the restriction "exceed[s] the outer limits of restraint reasonably necessary to protect the defendant."

521 F.2d at 1248-49 (footnotes omitted). *See Braxman v. Bassett Furniture Industries, Inc.*, 552 F.2d 90, 102 (3d Cir.), *cert. denied*, 434 U.S. 823, 98 S.Ct. 69, 54 L.Ed.2d 80 (1977). *Cf. Consolidated Farmers Mutual Ins. Co. v. Anchor Savings Ass'n*, 480 F.Supp. 640, 653 (D.Kan.1979) (mortgage institution's lending policies are reasonable and need not constitute least restrictive alternative).

tinued after one year, but this was due to the licensee's failure to meet the royalty payments guaranteed in the license agreement. Other licenses, arguably infringing on Topps' rights, or at least involving a competitive product, were granted by the Association under the commercial authorization program.[19]

Turning to the 1968 agreement, far from being a combination between two horizontal competitors designed to foreclose entry into the trading card market, that agreement was simply a collective renegotiation of all the players' individual licensing agreements with Topps. Its primary purpose was to increase the players' royalties

19. These agreements included: 1970 license to Beatrice Foods for player likenesses on the boxes of Milk Duds Candy (Plaintiff's exhibit 74, App. at 952-53); 1970 license to ITT Continental Baking for the sale of trading cards with cookies; 1970-71 and 1974 license to Kellogg's Co. to sell pictures in a package of 54 baseball cards for $1.50 and a cereal box top (Plaintiff's exhibits 85, 87, 89, 137, 338); 1972-73 licenses to Madaras, Inc. and Pasco, Inc. of Winona, Minnesota, to sell baseball novelties, including picture packs (Joint App. at 520); Pro Star, Inc. of Canada, for 3½" × 5½" player postcards (Plaintiff's exhibit 123, Joint Appendix at 521); and 1973 license to Charles Linnett Associates to sell 4" × 6" pictures of players. (Plaintiffs' exhibits 90-92; 94-95).

There was only one instance where the MLBPA did not accept a licensing proposal that was competitive to Topps. This occurred in 1974 with Michael Aronstein's proposal to market trading cards alone as a "collector set." This was a blatant interference with Topps' exclusive rights, and both Topps and the MLBPA informed Aronstein that no license would be issued. Aronstein continued to market his cards whereupon Topps obtained a preliminary injunction. The case ended in a settlement that approved the publication of the cards already produced. (Plaintiff's exhibit 144). Topps' and the Association's joint protection of their exclusive contract rights is not proscribed by the antitrust laws. It is not a violation of the Sherman Act to institute a proper infringement action. *See W. L. Gore & Assoc., Inc. v. Carlisle Corp.*, 529 F.2d 614, 625 (3d Cir. 1976) (commencement of a good faith patent infringement suit does not constitute an antitrust violation).

under their prior license agreements. As such, the contract is more akin to a vertical licensor-licensee agreement than to a combination between horizontal competitors. Indeed, even to label the MLBPA, a labor union charged with negotiation of collective bargaining agreements, and Topps, a major bubble gum and novelty manufacturer, as competitors stretches the usefulness of the term.[20] In addition, licensing proposals in competition to Topps would not necessarily decrease the players' total royalty payments. While such competitive products might depress the sales of Topps trading cards, they would also generate license royalties of their own which, through the commercial authorization program, would go directly to the players. The net effect of such competition could have been to increase player royalties, through a larger number of licensed products.

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20. Fleer contends that *International Boxing Club v. United States*, 358 U.S. 242, 79 S.Ct. 245, 3 L.Ed.2d 270 (1959), involved a similar horizontal agreement in the promotion of championship boxing matches and hence controls this case. We disagree. *International Boxing* concerned a combination among the four largest promoters of championship fights to exclude any competition in the promotion of championship boxing. Prior to the agreement, the conspirators each controlled a separate stadium in one area of the country. After the agreement the combination controlled 93% of the championship fights for a two and one half year period. Because the defendants controlled all the national stadia, all competition was foreclosed. In the instant case, the MLBPA and Topps are licensor-licensee, not horizontal competitors. The relevant market in this case consists of bubble gum cards with a low cost premium. While Topps may control the sale of cards with gum, (*but see* text accompanying notes 16-18 *supra*), it is the MLBPA, through the commercial association agreement, that handles the sale of trading cards with non-confectionary premiums and several of these competitive licenses have been granted to rival trading card products. Hence, the close knit market control of *International Boxing* is inapposite.

The final section 1 issue before the district court was the MLBPA's rejection of Fleer's 1974 license proposal. Because the proposal called for the sale of player likenesses in 5″ × 7″ patches, Topps had a right of first refusal under the 1968 agreement. Topps decided to waive this right, but Joel Shorin cautioned Miller that such a product might not move well and might inhibit retailers from purchasing other baseball related products.

Initially, the executive board's decision to reject the Fleer's decision was unilateral. While the players may have considered the proposal's effect on their Topps royalties, there was no unity of purpose or common design in rejecting the proposal. *Edward T. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980). In *Sweeney*, Judge Aldisert stated: "Unilateral action, no matter what its motivation, cannot violate § 1 . . . . The evidence must permit the inference that the alleged conspirators 'had a unity of purpose or a common design and understanding, or a meeting of the minds.'" *Id.* at 110-111 (citations omitted).

Secondly, as a licensor, the MLBPA is free to grant licenses to any competitor, or none at all. *W. L. Gore & Asso. Inc. v. Carlisle Corp.*, 529 F.2d 614, 623 (3d Cir. 1976) ("[T]he right to refuse to license is the essence of the patent holders right. . . .") The MLBPA is free to consider income potential in making any licensing decisions. *LaSalle Street Press, Inc. v. McCormick & Henderson, Inc.*, 445 F.2d 84, 95-96 (7th Cir. 1971) (patentee has right to "consider relevant factors affecting the patentee's business in determining to whom a license will be offered and the condition upon which a license will be granted"). The Association's rejection of Fleer's proposal was a lawful exercise of its right to grant licenses in the players' best interest.

Taken individually, or even as an interlocking network, the agreements at issue do not rise to the level of a section 1 violation. There were several competitive licenses for trading cards with non-confectionary goods and ample opportunity for competitors to challenge Topps directly by contracting with minor league players or persuading major league players not to renew their present agreements with Topps. Finally, the rejection of Fleer's 1974 proposal was a lawful exercise of the Association's right to expand selectively its licenses over baseball products.

B. *Section 2 Claim*

The district court found the Association and Topps liable for a section 2 violation "[f]or virtually the same reasons that defendants have been found to have violated § 1 of the Sherman Act. . . ." 501 F.Supp. at 511. Although the court did not make a finding as to whether appellants had the specific intent to monopolize, it ruled that a showing of specific intent is not required to sustain a conspiracy to monopolize claim where actual monopoly power is proven.[21] The court reasoned that such power existed in this case because appellants excluded all competition from the relevant market through a network of interlocking contracts. We disagree.

Specific intent to monopolize the relevant market is a necessary element of conspiracy to monopolize. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626, 73 S.Ct. 872, 889, 97 L.Ed. 1277 (1953); *Carpet Seaming Tape Licensing v. Best Seam, Inc.*, 616 F.2d

21. As the district court specifically stated: "The parties have not sufficiently framed the question of specific intent to permit the court to make a reasoned determination as to whether it existed, but, in any event, the court holds that such a finding is not required in this case." *Fleer*, 501 F.Supp. at 511.

1133, 1141 (9th Cir. 1980); *V. & L. Cicione, Inc. v. C. Schmidt & Sons, Inc.*, 403 F.Supp. 643, 651 (E.D. Pa. 1975), *aff'd* 565 F.2d 154 (3d Cir. 1977). Such intent may be inferred, however, from the proof of actual monopoly power. *American Tobacco Co. v. United States*, 328 U.S. 781, 789, 66 S.Ct. 1125, 1129, 90 L.Ed. 1575 (1946); L. Sullivan, *Handbook of the Law of Antitrust* 133 (1977). Monopoly power consists of the ability to control prices or exclude competition from the relevant market. *United States v. Grinnell Corporation*, 384 U.S. 563, 571, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966); *United States v. E.I. du Pont De Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 1004, 100 L.Ed. 1264 (1956). The district court held that appellants did not have the ability to control the price of baseball trading cards.[22] Hence, in order to sustain the section 2 violation the district court must have found that appellants excluded all meaningful competition from the baseball trading card market. This is a mixed question of law and fact which is not governed by the "clearly erroneous" standard. We conclude that the district court erred.

As was discussed in reference to the section 1 claims, the contracts at issue did not foreclose competition in the relevant product market. In sales of trading cards with

22. Indeed, a study conducted by the Child Research Service, Inc. (Esserman Study) concluded that the demand for baseball trading cards was quite elastic. The study consisted of interviews with boys ages 7-12, conducted during successive weeks, outside of candy and convenience stores in three separate cities (Rochester, Cincinnati, and Minneapolis). During the first week of the study the price of Topps' baseball cards was twenty cents. In the second week the price was raised to forty cents and baseball trading cards experienced an 88% decrease in sales. In the second week a large percentage of those boys who considered baseball cards but did not buy them, "bought something else instead," because the price was too high. Joint appendix at 432.

gum, rival manufacturers could compete against Topps for minor league player's licenses. That such a program might take five or six years before a product could be marketed is a reflection of the minor league farm system and does not mean competition was foreclosed. In sales of trading cards with non-confectionary low cost products, Topp's exclusive licensing agreements had no effect. Indeed, the commercial authorization program of the MLBPA promoted competition in the non-confectionary goods market. Individual manufacturers concluded one agreement with the Association, rather than chasing down hundreds of individual players. *See* note 19 and accompanying text *supra*.

The rejection of Fleer's 1974 proposal does not transform such a pro-competitive arrangement into a violation of the Sherman Act. Several non-confectionary product licenses have been issued by the Association since the inception of the commercial authorization program. The rejection of one proposal because, in the minds of the players' executive board, it might depress the overall sales of baseball products is not evidence of monopoly power. Rather, it reflects that not every opportunity for a publicity license must be used. The right to withhold and negotiate publicity selectively for economic gain is implicit in the very nature of the right of publicity. *Zacchini*, 433 U.S. at 575, 97 S.Ct. at 2857.

Because we hold that Topps and the MLBPA did not have the power to exclude all competition from the relevant market, we cannot sustain the district court's finding of a section 2 violation. Moreover, there is no record support for the court's finding of a section 1 violation. Therefore, we do not reach the injunction or damages issues. We will reverse the district court's judgment and remand the case with instructions to enter judgment for appellants.

UNITED STATES DISTRICT COURT,
E. D. PENNSYLVANIA.

Civ. A. No. 75-1803.

FLEER CORPORATION

v.

TOPPS CHEWING GUM, INC. and Major League Baseball Players' Association.

June 30, 1980.

Matthew Strickler, Linda S. Martin, Robert J. Lewis, Philadelphia, Pa., for plaintiff.

Sidney Harris, Washington, D. C., for Topps.

Donald Fehr, New York City, for Major League Baseball Players Assoc.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

NEWCOMER, *District Judge.*

Topps Chewing Gum, Inc., is the sole significant manufacturer and seller of baseball cards in the United States. Fleer Corporation, a competing bubble gum manufacturer, has sued under the antitrust laws to obtain the right to sell baseball cards in competition with Topps, alleging that Topps and the Major League Baseball Players Association have unlawfully restrained trade in baseball cards. After trial of the action, the Court has determined

that Topps and the Players Association have restrained trade in the baseball card market in violation of § 1 and § 2 of the Sherman Act. The Court makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52(a), F.R.Civ.P.

FINDINGS OF FACT

1. The plaintiff, Fleer Corporation, is a Delaware corporation whose principal place of business is Pennsylvania. The company manufactures bubble gum, candy, toys and novelties primarily for sale to children.

2. Topps Chewing Gum, Inc., one of the two defendants in this case, is a New York corporation with offices in New York City. Its principal manufacturing and distribution facility is in Duryea, Pennsylvania. Topps, like Fleer, manufactures bubble gum, candy and novelties primarily for sale to children.

3. Defendant Major League Baseball Players Association is a labor organization whose primary responsibilities are to negotiate, administer and enforce collective bargaining agreements reached with baseball team owners on behalf of the players.

4. This is an antitrust action brought by Fleer against Topps and the Players Association. Fleer alleges that Topps and the Association have monopolized and unlawfully restrained trade in baseball cards in violation of §§ 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2.

5. Topps is the only significant seller of baseball cards in the United States. It is the only company that sells baseball cards in the form with which the public is most familiar a package of about ten baseball cards containing one piece of bubble gum. (P-241).[1]

1. At different points in its Findings of Fact the Court has noted one or more exhibit numbers which support a given finding.

6. Topps's best-known product is "Bazooka" bubble gum, but the company also produces a great variety of other products. Those products include "Garbage Candy" (candy sold in a miniature plastic garbage can); "Crunchy Lunch"; "Ring Pop"; "Krypton Gum"; and a variety of editorial (non-sports) trading cards such as "The Incredible Hulk"; "Charlie's Angels", "Superman", and others.

7. Topps also manufactures and sells football cards, basketball cards and hockey cards, which like baseball cards are sold only in the part of the year during which a given sport is played.

8. In 1978, Topps's total domestic and foreign sales were about 67 million dollars. Fleer's total sales were about 15.2 million dollars.

9. Fleer's best-known products are "Dubble-Bubble" bubble gum, and "Gatorgum", a soft chewing gum that is designed to help quench thirst. The company has also marketed products such as "Fireplugs", "Mr. Bones" (hard candies in a plastic coffin), and "Bubble Burger" (bubble gum shaped like a hamburger), among others.

The Contracts

10. Since 1966, Topps has entered into a baseball card contract with virtually every new player entering professional baseball at either the minor or major league level.

11. Every contract between Topps and a player is and has been on a standard form contract (P-54, P-55,

1. (Cont'd)

The Court has made no attempt to cite exhibits for every or even most findings, nor is it intended that a citation to an exhibit summarizes all of the evidence in support of a finding. The sole purpose of citing exhibits is in some way to simplify the task of the parties and our brethren in the appellate courts who may be required to review this massive record in the course of an appeal.

P-56), which grants Topps the exclusive right to sell that player's name and picture "alone or in combination with chewing gum, candy and confection, or any of them", for the first five baseball seasons in which that player is in the major leagues, no matter when those seasons occur.

12. Topps's form contract forbids a player from granting to another *any* of the rights covered by the contract before that contract expires. As a result, competitors are not able to secure baseball card rights from players for a period beginning at the expiration of the Topps contract. The best that a competitor can do is to solicit an agreement that the player will not renew his contract with Topps, which would give the competitor an opportunity to make an offer for the rights at the expiration of the Topps agreement.

13. It has been and remains Topps's practice to renew its contracts with major league players every other year. Renewals are for two year periods, and are solicited by Topps sometime before opening day, whenever a player has less than five (i. e. four) seasons remaining on his contract with Topps. Virtually all major league players sign such renewals. As a result of the renewals, about 50% of the players (at the beginning of the season) are obligated to Topps for five playing seasons, and about 50% (at the beginning of the season) are obligated to Topps for six playing seasons.

14. In 1966, the Players Association hired Marvin Miller as its first full-time executive director. Mr. Miller's background is in labor relations, and he assumed his position primarily to organize the players' collective bargaining efforts. However, upon his arrival in 1966 he found that the Association was facing a temporary financial emergency.

15. The Association needed funds to pay for its new office space in New York City, and to pay the salaries of a small staff of three or four persons. The solution that Mr. Miller devised was to finance the Association's activities through a group licensing program with the Coca-Cola Company. Coca-Cola wanted to place a series of pictures of 500 major league players on the inside of its bottlecaps, and it asked the Association to obtain the necessary authorizations from the players. The Association did so, Coca-Cola paid the Association for those rights, and the funding crisis was resolved.

16. After the Players Association began to collect membership dues, it decided to return licensing income to the players. The Coca-Cola license was such a success that the Association decided to continue group licensing on a routine basis. Miller originally conceived the group licensing effort as a stop-gap funding effort, but the players were so pleased with the income that it generated, that they insisted on retaining it on a permanent basis.

17. The commercial authorization is a contract by which each player grants the Players Association the exclusive right to use his picture, name and signature with other players in a group. In turn, the Association grants exclusive group licenses to various merchandisers. (P-8).

18. Virtually every player now in the major leagues is a party to a commercial authorization. The standard commercial authorization is distributed to the players in spring training with an Association dues check-off authorization. The commercial authorization has a three year term. Renewals are obtained by a team's player representative, i. e. the player on a team who acts as the union's "shop steward". The record is silent as to how often renewals are obtained, but it is apparent, first, that many players sign at the same time, as part of a group; second,

that the player representative determines when renewals are appropriate; and third, that renewals are not necessarily obtained near the end of a player's three-year term.

19. The standard commercial authorization reads in pertinent part as follows:

> "[T]he undersigned hereby exclusively authorizes the Major League Baseball Players Association to market rights, together with other Major League players as a group, to the use of his name, picture (still photographs, motion pictures or television, except for Club publicity purposes) and signature. It is understood that such rights will be sold for the players as a group on an exclusive basis and shall not involve a personal endorsement by any individual.
>
> It is also understood that monies received by the Major League Baseball Players Association for the sale of such group rights will be used to defray the cost of operation of the Players Association and that such monies will be credited to the undersigned individuals as dues paid to the Association.
>
> Any monies earned from the sale of such group rights which exceed the budget of the Association shall be distributed among all members of the Association who have authorized the sale of such rights.
>
> Any group licensing contract entered into with an individual company for the promotion of its products, shall exclude players who are committed by contract to competitive products. In the event any such company is interested in securing a personal endorsement, it is understood that such endorsement will require the personal approval of the individual involved and a separate payment directly to him.
>
> This authorization shall be for a three year period."

20. The Players Association construes its commercial authorizations to mean that a merchandiser cannot negotiate individually with players to obtain a group of contracts. Topps and bat and glove manufacturers are not subject to that interpretation because they contract individually with players for endorsement or marketing rights while the players are still in the minor leagues. Virtually all players therefore sign their first commercial authorizations *after* they are already under contract to Topps and the glove and bat companies.

21. On many occasions between 1971 and 1976 the Players Association advised persons or companies who engaged in direct solicitation of marketing rights from players that the Association is the exclusive agent for group licenses for all major league players, and that those persons or companies should desist from direct solicitation of the players. (Miller Dep. 346).

22. In late 1974, Topps advised the Association that a Michael Aronstein was soliciting players for baseball card rights. The Association wrote Aronstein a letter which said in part:

> "It has come to [our] attention that you have been soliciting major league players, coaches and managers to grant permission to have their pictures used in connection with a baseball card collector set. The Major League Baseball Players Association is the exclusive assignee of the players, coaches and managers with regard to their property rights in connection with group promotions and group commercial endeavors. A project such as yours cannot be undertaken without a license to do so from the Players Association. In any event, however, a license cannot be granted to you since Topps Chewing Gum,

> Inc. is by contract our exclusive licensee for baseball cards either sold alone or together with confectionary products. In addition, the individual players, managers and coaches have contracts with Topps granting that company the exclusive rights noted above.
>
> You are hereby instructed to cease and desist from all your activities in this regard. Should you fail to do so immediately, we will bring an appropriate action for damages and injunctive relief." (P-62).

23. The Players Association holds all of the rights that are available to license a non-confectionary baseball card product, since the Association's contracts with its members prevent a competitor from engaging in direct solicitation of contracts from the players. Moreover, the Association has an extraordinary degree of cooperation from its members in the licensing area, and is able to enforce its rights.

24. The major leagues are an open shop. Major league players are not required to join the Players Association. Nevertheless, only three active major league players have declined to join the Association in the past 13 years.

25. In late 1966, Marvin Miller met with the president of Topps, Joel Shorin, to discuss the terms of Topps's contracts with the players. Miller was concerned that the players were not receiving sufficient compensation for the rights they were granting.

26. At that time, Topps paid each minor league player $5.00 for his signature on an initial contract, and $125.00 for each season he was in the major leagues for 31 days, or for any year in which his picture was used

in a baseball card series. Topps paid no royalty. Miller told Shorin that Topps's contracts were unfair to the players; Shorin disagreed.

27. Miller and Shorin continued their discussions, but Topps was unwilling to give up any of its rights. During a meeting among Marvin Miller, Joel Shorin and a prospective licensee of the Players Association, Shorin refused even to define the limits of Topps's rights. Topps nevertheless threatened legal action if those rights were infringed. (P-15)

28. In February of 1968, Miller related the difficulties he had been having with Topps to the Executive Board of the Players Association. (The Executive Board is the Association's governing body. It consists primarily of designated player representatives). The Executive Board voted to recommend that Association members—virtually all major league baseball players—cease renewing their individual contracts with Topps. That recommendation was accepted, and very few players signed renewals with Topps. Realizing that Topps faced a formidable opponent in the Association, Shorin contacted Miller to determine if an end to the dispute could be negotiated.

29. As negotiations began, the Players Association demanded a uniform expiration date for all of Topps's contracts; an agreement that the Association would at some point offer the rights on a bid basis; a limitation on Topps's rights to sell baseball cards "alone"; and more money for the players.

30. Topps offered only more money. The Players Association threatened to persuade the players to enter into agreements with it not to renew their contracts with Topps. (P-21)

31. Shorin and Miller met again on April 23, 1968. At that time, Shorin gave Miller a legal memorandum that stated that the Association's group licensing program violated the antitrust laws. (Miller Dep. 232-233). Shorin also tried to persuade the Association to make a joint statement to the players that Topps's new money offer and proposed contract were fair. (P-24)

32. The Association, in turn, believed that Topps's contracts with the players violated the antitrust laws, and Richard Moss, counsel to the Association, so advised Shorin.

33. The Players Association submitted a counter-proposal in the form of a contract between Topps and the Association. The proposal suggested higher royalties and a uniform expiration date for Topps's contracts.

34. Negotiations between Topps and the Players Association continued. By late September, 1968, Topps and the Association had reached tentative agreements on most issues.

35. On November 19, 1968, Topps and the Association entered into an eight page contract which provided as follows:

> (1) All contracts between Topps and major league players were amended to increase the payments to individual players from $125 per year to the greater of (i) $250 per year, or (ii) a pro rata share of 8% of Topps's sales up to $4,000,000 and 10% of Topps's sales in excess of $4,000,000;
>
> (2) Major league players were guaranteed royalties equal to those paid by Topps to professional football players for the use of their pictures on football cards.

(3) Pictures 5" × 7" or larger with a sale price of 25 cents or greater were excluded from Topps's rights, except that Topps retained a right of first refusal as to any such merchandising proposal;

(4) The Association would not "interfere with the Topps contracts, its procurement of such contracts or its policy during the existence of this Agreement."

(5) Topps would advise the Association as to whether Topps would release its rights under its contracts with the players to permit the Association to license any proposal which otherwise infringed Topps rights. (P-1)

36. In 1973, Topps and the Association extended their royalty agreement for an additional five year period, i.e. from 1976 to 1981.

Fleer's Standing

37. In September of 1974, Donald Peck, the president of Fleer, approached Marvin Miller of the Players Association about Fleer's obtaining a license from the Association. Fleer sought a license to market 5" × 7" satin patches, to be sold at 25 cents each, picturing active major league players.

38. Fleer sought a license for a 5" × 7" product because that was the only type of product resembling baseball cards that it believed the Players Association might be willing to license.

39. Fleer had a number of discussions about the 5" × 7" proposal with representatives of the Players Association. Marvin Miller called Topps to determine whether Topps would exercise its right to market the product (derived from its right of first refusal). Topps declined to do so. Fleer's offer included a $25,000 guarantee and a royalty of 15% on sales.

40. The Executive Board of the Players Association refused to license Fleer's proposal. Its principal reason for doing so was its fear that Fleer's product would remain unsold on store shelves, prompting store owners to cut back on orders of Topps's baseball cards until the 5″ × 7″ items were sold. (TR 2397 98) The Players Association receives substantial income from sales of Topps's baseball cards, and it did not want to jeopardize that income by licensing the Fleer proposal.

41. Had the agreement between Topps and the Association not existed, the Fleer 5″ × 7″ proposal might have been accepted, since Mr. Miller, at least, was at first receptive to the proposal. (TR 154, 157-8).

42. Fleer's 5″ × 7″ proposal was a serious one. Fleer would have marketed the product had it obtained a license to do so. The defendants' arguments that the proposal consisted merely of four lines drawn on a piece of paper and that it was an artifice to permit Fleer to obtain standing for an antitrust suit simply are not supported by the record.

43. Fleer currently has (and, as of 1974, had) production machinery with which to manufacture baseball cards. It also manufactures low cost novelties. It has shown that it has the ability to finance production and sale of a wide variety of low cost gum, candy and novelty products. Had Fleer chosen, it could have made a credible bid on some form of baseball card rights.

44. Fleer had some experience and background in the baseball card business. During 1963, it marketed baseball cards with a cookie, and at one point in the 1960's it had entered into non-exclusive contracts with more than 3,000 professional baseball players. (In 1966, Fleer sold those rights to Topps for $395,000.) In the 1970's, Fleer began

to market (and still markets) team logos (insignia), in the form of "stickers", under license from the major league baseball club owners' licensing group.

45. Fleer has desired to enter the baseball card market since at least 1968. (The defendants very much dispute whether Fleer made serious *efforts* to enter the market). Fleer has "intended" to enter the market since at least 1974 when it made its 5" × 7" proposal.

46. In April of 1975, Fleer asked Topps to waive its exclusive rights so that Fleer could pursue a license to sell stickers, stamps, and decals depicting active major league players. Topps refused to do so.

Relevant Market

47. In 1978, the standard Topps baseball card package consisted of 14 baseball cards and a slab of gum weighing 4.30 grams. The normal retail price was 20 cents per package.

48. Topps's baseball cards are 2½" × 3½" in size. Most of the cards have a name and picture of a single player, in team uniform, on the front, and career statistics and personal information (height, weight, age, how he bats and throws) on the back. Other cards show groups such as "all-stars" or "rookies"; pictures of teams; managers; and series "checklists" which permit collectors to keep track of their acquisitions.

49. Topps's baseball cards are marketed each year in series. That is, only 100 or so of the 600-700 cards are released at a time. The process of releasing series continues throughout the spring until all of the cards are available. The series concept stimulates collecting. Players are mixed in the packages at random, with no divisions by team, league, position, etc.

50. Boys, age seven through twelve, are the primary consumers of baseball cards in the United States. Boys not in that age group, girls, and adults also buy some baseball cards.

51. In 1978, sales of Topps's baseball cards with gum in the primary twenty cent package accounted for $6.6 million in sales out of Topps's total baseball card sales of $9.2 million. $2.6 million dollars of sales were achieved with products such as "Rack-packs" (a large number of baseball cards sold alone) and 500-card vending packs.

52. Topps's Proposed Finding No. 242 is accurate. "Children buy Topps' baseball cards to obtain both the cards and the bubble gum, but it is the cards they want most. Children in one study felt that the gum in editorial card packs was less desirable than bubble gum sold alone, but said they may chew it anyway. Thus, the gum is also an important part of the package in that it also serves as a treat or attraction."

53. Topps's baseball cards are sold primarily in convenience stores, discount stores, and small local grocery stores. Most baseball card purchasers buy their cards from convenience stores, such as "7-11" stores.

54. Baseball cards are usually sold on the candy and gum rack of a convenience, variety or grocery store.

55. Convenience, variety, discount, and similar stores typically offer a wide range of products on their candy and gum shelves, or in their candy and gum sections. This range of products includes bubble gum, regular chewing gum, candy of all kinds, and novelty and low cost toy items such as candies in toy containers, stickers, decals, iron-on and stick-on patches, trading cards, etc. A candy rack usually includes many items, only one of which is baseball cards. Most of the items on such a rack are priced in the 15-50 cent range.

56. A wide variety of trading cards are currently being sold. Topps, the Donruss Company, and Fleer publish a variety of trading cards, usually sold with gum, featuring characters, celebrities, symbols, scenes and stories drawn from television shows, motion pictures, musical groups, professional sports, and other activities.

57. With few exceptions, editorial (non-sports) cards rarely sell for more than one, or at most two, years. Editorial card series are usually based on short-lived popular interests—"fads"—such as movies and television shows. The normal editorial card series contains only 66 cards, and there are not usually convenient units, such as professional sports teams, to serve as goals for collectors.

58. Sports cards, especially baseball cards, are perennial favorites. The popularity of baseball cards has spanned many decades, and the yearly changes in a player's career statistics, as well as trades to different teams, guarantee that each year's series holds new interest for the collector.

59. Baseball cards have been marketed in very large (600-700 card) series. Consumers who are interested in collecting are able to make purchases over many weeks without completing the series.

60. Trading, collecting and learning about players are the most common reasons for children to purchase baseball cards. Editorial cards are purchased primarily because of the appeal of the subject matter, which is presented in a variety of entertaining ways, e.g. action pictures, satire, etc.

61. Topps's baseball cards are sold to wholesalers from February through August, although a sharp drop in sales occurs in May. Topps's football cards are sold from August through November; Topps's hockey and basketball cards are sold from October through January.

62. Baseball cards are most often sold with a premium-Topps's bubble gum—but, occasionally, baseball cards are sold *as* a premium. For example, baseball cards have, in the past decade, been sold with cereal, cupcakes, candy and hamburgers. Baseball cards sold as premiums are difficult to collect as a series because of the cost of the underlying products.

63. A variety of low cost novelty items which have "play value" may be found on a typical candy rack. "Container" candy ("Fireplug", "Mr. Bones", "Pez", etc.), editorial trading cards, bubble gum, carbonated candy, iron-ons, and baseball cards all satisfy a child's desire to play (and often to eat at the same time.) Broadly speaking, most novelty items compete with most other novelty items for a child's money.

64. Baseball cards are by far the most consistent trading card item (in terms of sales) sold in the United States. The record shows only one example of a trading card product having achieved more sales than baseball cards (in 1973-74); that item was called "Wacky Packages". In 1976, baseball card sales accounted for about 46 percent of all trading card sales (exclusive of hockey, basketball and football cards). In other years, baseball cards have garnered about one-third of all such sales. (P-380).

65. The level of public perception of baseball cards as a distinctive product is high. Baseball cards are viewed by consumers and the public as "baseball cards" more than as a sub-species of trading cards, or as a novelty. They are, in fact, viewed as a separate market.

66. Baseball cards have a number of peculiar uses. They are used for trading in childhood simulations of actual player trades in the major leagues. Also, baseball cards are collectable in a way that distinguishes them from

other trading cards. The buyer of editorial cards (e.g., "Superman" cards), has only an arbitrary number of cards as a goal for his collecting (usually 66). A baseball card consumer, on the other hand, knows (for example) if he has not yet found Dave Winfield, Keith Hernandez, Robin Yount or Ron Guidry, and can plan the number of his purchases accordingly. Baseball cards are the only product on a typical candy rack to set forth baseball statistics. They are, in other words, an education in baseball. Baseball cards have lasting play value rather than emphemeral play value. They can be saved for weeks, months or years. Very few products on a candy rack have the same sort of lasting play value.

67. Children have a fairly keen sense of the nature of the products they purchase (TR 2101). Furthermore, they "rotate" their purchases, that is, they buy a large variety of items. (DT5381, IIA; Table 14). Such rotation satisfies different needs with different purchases. (TR 4061).

68. Children make as many as half of their gum, candy and confection purchases on impulse, that is, their decision as to what to purchase is often made after entering the store. (DT5381; Table 5).

69. Topps's baseball cards are the only product on a typical candy rack to picture virtually all active major league players.

70. The principal function, or end use, of baseball cards is to satisfy a child's desires to learn about major league players, collect their pictures and trade their pictures. (P-161, Tables 25, 26).

71. "Play" is a function performed by baseball cards. However, the consumer studies in evidence did not show that children emphasized wanting to have fun or wanting

to play as their reason for purchasing baseball cards. It is not likely, therefore, that all other low cost products with "play value" are perceived by children as being good substitutes for baseball cards.

72. Baseball cards also function as "treats". They gratify a child's urge to buy something pleasant at a convenience or grocery store.

73. Baseball cards require unique production facilities in two respects. First they are cut and wrapped on a "DF" machine, which is necessary for efficient production of trading cards. Second, and more important, a producer cannot sell baseball cards unless it first obtains permission from major league baseball players to do so. See *Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

74. There is insufficient evidence on the record to determine whether Topps' competitors consider baseball cards to be a separate market or submarket. Fleer has therefore failed to prove that the industry recognizes baseball cards as a separate market.

75. Baseball cards do not have distinctive prices. They are priced at about the same level as candy bars and many different types of chewing and bubble gum.

76. Sales of Bubble Yum, a soft bubble gum introduced nationally by Lifesavers, Inc. in 1976, had a huge adverse impact on the sales of traditional hard bubble gums, such as Topps's "Bazooka" and Fleer's "Dubble Bubble."

77. Close substitutes should show reciprocal sales movement.

78. Sales of baseball cards are not affected by sales of editorial (non-sports) cards. Editorial cards are not meaningful substitutes for baseball cards.

79. Topps often sells its editorial cards at a lower price than its sports cards.

80. Topps introduced into evidence an elaborate market study conducted by Child Research Service, Inc., a child marketing research firm headed by June Esserman. Mrs. Esserman testified as an expert at trial. The study consisted of an analysis of the results of interviews with boys ages 7-12 conducted during successive weeks outside of candy and convenience stores in three separate cities (Rochester, Cincinnati and Minneapolis). The children were asked a great variety of questions about what they had considered purchasing, what they actually purchased, what they paid, etc.

81. During the first week of the Esserman study, the price of Topps's baseball cards was 20 cents. During the second week, the price of baseball cards was raised to 40 cents. Baseball cards suffered a precipitous drop in sales during the second week. A large percentage of those boys who considered baseball cards but did not buy them "bought something else instead"—largely because the price was too high.

82. The Esserman study was designed to show (and did show to an extent) the existence of price cross-elasticity among the items on a typical candy rack.

83. Sales of baseball cards were shown to be sensitive to a price increase of 100%. The Esserman study showed that a rise in price from 20 cents to 40 cents caused an 88% decline in sales of baseball cards. (DT 5381, Tables 1 & 4).

84. There is little evidence in the record to show whether sales of baseball cards are sensitive to small changes in price. In 1974, the price per card in the standard package rose about 4% (adjusted for approxi-

mately 6% inflation) over the 1973 price, and sales rose about 35% (adjusted for inflation). In 1975, the price per card in the standard package rose about 17% (adjusted for inflation) over the 1974 price, and sales fell about 17% (adjusted for inflation). In 1978, the price per card in the standard package fell about 12% (adjusted for inflation) compared to the 1977 price, and sales rose about 32% (adjusted for inflation). (P-182 through P-187; DT 5431R; stipulation of counsel).

85. Baseball cards are unique. For decades, they have been an important and distinctive part of many childhoods. Baseball cards have achieved a type of public recognition that distinguishes them from such items as other trading cards, bubble gum and candy. Cardboard, wallet-size pictures of active major league players have existed for generations. Even if the product was merely a casual idea of a long-forgotten promoter in the 1880's, and even if there are hundreds of variations and substitutes which logically might exist, the concept is now so embedded that baseball cards literally define themselves. The permanence of those cardboard pictures is a market reality which the Court must recognize.

86. The baseball cards themselves are the part of Topps's package that are primarily sought by children. The gum is of lower quality than Topps's normal bubble gum, and is offered simply as a premium for the cards. In fact, many children do not chew it. A number of low cost (perhaps baseball related) non-confectionary products would also serve as potentially attractive premiums, among them felt insignia, plastic novelties or emblems, magnets in the form of team logos, a batting average calculator (cf. DT 267), or iron-on patches.

87. The relevant economic submarket in which baseball cards are sold consists of all pocket-size pictures of

active major league players, sold alone or in combination with a low cost premium, in packages priced from 15 cents to 50 cents.

Competitive Impact of the Challenged Restrictions

88. Topps has faced no serious competition in the baseball card market since the 1950's. Since 1978, the interlocking contracts at issue in this case, as they have been applied (P-1, P-8, P-56), have made entry into the baseball card market very difficult or impossible.

89. Topps's rights are not protected by any patents or copyrights, nor were they at any time protected by patents or copyrights. There is no legal requirement that either Topps or an individual enter into an exclusive, as opposed to a nonexclusive, contract for the use of the player's picture. Topps did not have its market position "thrust upon" it.

90. Topps does not vary the format of its baseball card product. It markets only that type of card described in Finding 48, *supra*.

91. Fleer and Topps have essentially agreed that a competitor who could compete evenly with Topps for major and minor league player contracts (assuming the Association would not block the major league segment of such an effort), could market a series of about 150 baseball cards within six or seven years. Those estimates were based on relatively complicated assumptions about the average careers of minor league players. (Topps Proposed Findings 155-157; Fleer Proposed Finding 203). Topps, on the other hand, could compete against that series in the sixth year with about a 570 card product.

92. The assumption that a competitor could compete evenly with Topps for player contracts is an optimistic

one. Topps is an entrenched competitor, and its influence with the players is considerable. A competitor facing six (and likely more) years of uncertainty before it can market even an inferior trading card product is likely to take its capital and its energies elsewhere. (TR 733-734, 2589).

93. Each of the parties agrees that exclusive contracts are necessary in the baseball card business. The Court does not find that assertion credible, if what is meant is that the baseball card market will support only one brand of baseball cards. Topps has an obvious motive to make such an argument, and Fleer needed to make the argument to support its proposed injunctive relief. The Association, moreover, is in the business of granting exclusive licenses.

94. Exclusivity might be necessary in "fad" licensing, where competition might engender sufficient confusion in consumers' minds about the make-up of a product to ruin a one or two-year marketing effort. Baseball card consumers, on the other hand, have a demonstrably high degree of product awareness, and the permanence of baseball cards as a marketable item insures that competing products would have time to "sort out" in consumers' minds. Nothing in logic or proof at trial has suggested to the Court that the presence of two or more baseball card products on the same candy rack would somehow be harmful to competition.

95. It is doubtful whether it would be useful to a hopeful baseball card competitor to try to obtain agreements from players not to renew their commercial authorizations. Even assuming that the competitor reached such agreements with a group of players, it would still be required to surmount a clause in Topps's contract. At no time during the term of the contract can a player grant

to anyone besides Topps the rights granted to Topps under the contract, even if those rights are to take effect at the expiration of the contract. Moreover, a player cannot, during the term of the contract, grant to another *"any rights similar [to]"* Topps's rights, even to take effect at the expiration of the contract. The right to market baseball cards with any low cost premiums, either confectionary or nonconfectionary, is a right "similar to" Topps's rights.

96. Sometime in the fall of 1968, Marvin Miller inquired as to Topps's position on a proposed Association license for the sale of baseball cards with rings. Topps, through Joel Shorin, vigorously opposed the granting of such a license, and said that Topps's attorneys had commented that the proposal would "disrupt [Topps's] program." Shorin advised Miller to advise the prospective licensee of Topps's position. (P-64)

97. To insure that Topps's rights were not violated, the Association included in its proposed contract with the licensee a provision that the intrinsic value of the rings had to be at least equal to half of the value of the whole product. The contract expressly referred to Topps's rights under its contracts with the players.

98. Milton Kayle (of Weston Manufacturing Corporation, the Association's one-time licensing agent) assured Topps that the Association would never knowingly do anything to violate Topps's rights under its contracts. Marvin Miller likewise told Topps that he was extremely careful not to violate Topps's rights. (P-69).

99. Topps and the Players Association routinely consult about whether a proposed Association license infringes Topps's exclusive rights. (TR 2369). The Association is anxious to avoid conflict with Topps. (Miller Dep. 430).

100. In its discussions with agents of the Association, Topps often cites marbles as an example of a "sham" product, that is, a product which, if sold with baseball cards, would effectively infringe Topps's rights to sell baseball cards "alone". In 1965, the Federal Trade Commission specifically mentioned marbles as a product with which baseball cards *could* be sold in competition with Topps. *In re Topps Chewing Gum, Inc.*, 67 F.T.C. 744, 839 (1965).

101. In 1974, Topps objected to the sale of baseball cards by the Kellogg Company. Based upon a license from the Players Association, Kellogg sold packages of 54 baseball cards for $1.50, plus a box-top from a 60 cent (approximate) package of cereal. (P-85; P-388, p. 9). The Players Association did not yield to Topps's pressure, but instead obtained formal waivers from Topps to continue to license the product. (P-87, P-89, P-137, P-138).

102. Topps has never stated its opinion as to what the minimum value of a non-confectionary premium must be to avoid infringing Topps's rights to sell baseball cards "alone". Fleer's evidence supports the inference, and a finding, that Topps's policy of objecting to baseball card products sold either with confectionary products or with low cost non-confectionary premiums continues at present. Topps has presented no evidence that suggests the contrary.

103. The royalty income from sales of Topps's baseball cards is paid directly into the Association's group licensing program. In 1978, the licensing program generated about $1.1 million; Topps's royalty payments accounted for about $847,000 of that total, or more than 75% (P-119; TR 2331).

104. The Association has never licensed a baseball card product that promised to provide meaningful competition to Topps's product.

105. Before the signing of the agreement between Topps and the Players Association (P-1), the Association aggressively challenged Topps's market position, explored with competitors the possibilities of licensing a product to compete with Topps, and even contemplated using its influence with the players to gain all of the rights held by Topps. The signing of P-1 enabled the Association's group licensing program to share in the revenues of Topps's gum and baseball card product.

106. However, P-1 has also been a disincentive for the Association to explore the limits of Topps's rights, especially in the Association's licensing of non-confectionary baseball card products. The evidence shows that, had P-1 not been signed, the Players Association would have continued to test Topps's rights. As it is, the Association's incentive to challenge Topps has been greatly reduced by the substantial income generated by P-1.

107. In 1970, the Association licensed an organization known as Sports Promotions to sell packages containing four baseball cards and two iron-on patches. Topps objected to the product as an infringement of its rights. Notwithstanding that the licensed product included a non-confectionary product that very arguably did not infringe Topps's rights to sell baseball cards "alone", the Association did not seek to test the extent of Topps's rights. Rather, the Association licensed the product only for 1970, and with the understanding that it would not be sold in the same channels of distribution as Topps's product.

108. The Association has licensed products that arguably infringed Topps's rights—as, for example, when it

licensed Beatrice Foods and ITT Continental Baking Co. to sell baseball cards is a premium to candy and cakes respectively. It has never, however, granted a license for a product whose principal attraction was the baseball cards themselves, with the possible exception of one stamp album. That product, however, included an album that was at least equal in value to the stamps.

109. P-1 is not, on its face, anti-competitive. However, because the Association holds and protects all of the rights to market groups of pictures of major league players not held by Topps, the *effect* of P-1 is seriously and unreasonably to restrain competition. Because Topps has agreed to pay the Association royalties on its baseball card sales, no competition to Topps has arisen.

110. Topps and the Players Association possess, and have exercised, the power to exclude Topps's competitors from the baseball card market.

111. Fleer has made a reasonably persuasive showing that Topps's profits on baseball cards are, at the very least, consistent with the existence of monopoly power, although not, in the Court's view, dispositive of the question. Topps's profits on baseball cards are equal to or higher than its profits on high-risk, "fad" trading cards. (Topps's objections to the plaintiff's methodology in calculating relative profits have been considered, and are explicitly rejected as nit-picking). Baseball cards involve virtually no risk of failure each year. Competitors ought to be attracted to the marketing of a low risk product that is as profitable as other high risk products. (Fleer's analogy to bonds is quite apt—under normal market circumstances, the return to investors should decline, rather than rise, as risk decreases.) That no competitors have appeared and profits have stayed high suggests that Topps has the power to control prices and exclude competition. (P-338, pp. 60-64).

112. Topps's exclusive contracts with the players do not promote competition. In fact, they contain a number of seriously restrictive clauses. For example, during the term of the contract a player cannot assign to another the rights held by Topps, even to take effect *after* the contract expires. Moreover, a player is under contract to Topps for his first five major league seasons *whenever they occur.* If a player spends seven years in the minor leagues after signing his first Topps contract, he is committed to Topps, and Topps alone, for twelve years.

113. Topps's contracts certainly improve Topps's competitive position, and any businessman would consider them desirable rights. Nevertheless, they impede rather than promote competition.

114. Both Topps and the Players Association have acted to exclude competitors who sought to market baseball cards with low cost premiums.

115. The Association's conduct in (1) refusing to license baseball cards to be sold with low cost premiums, and (2) challenging direct solicitation of the players for marketing rights, inhibits rather than promotes competition in baseball cards.

116. Topps and the Players Association have combined to restrain trade unreasonably in the baseball card submarket.

Damages

117. Fleer has shown that it was excluded from any meaningful opportunity to compete for player contracts. It has not shown that it suffered any *arguably* quantifiable pecuniary loss as a result of its exclusion.

118. Fleer has struggled to make a profit in a number of the years during the 1970's. Its net income (loss) in eight of those years was as follows:

1977	—	$346,621
1976	—	502,257
1975	—	720,274
1974	—	(309,261)
1973	—	382,354
1972	—	268,926
1971	—	148,494
1970	—	(200,016)

Fleer had a net *operating* loss in 1978.

119. Judging from the guarantee that the players receive from Topps—approximately $165,000 in the aggregate—and judging from Marvin Miller's reservations about Fleer's $25,000 guarantee for the 5″ × 7″ product, it is apparent that an Association license for baseball cards, if granted, would be somewhat expensive. The typical royalty for an editorial trading card is about $10,000. A baseball card license could be much higher than that.

120. Fleer has never had a great deal of success in marketing trading cards. It his never had a trading card item which achieved $750,000 in sales. Topps and Donruss (in that order) are the leaders in trading card sales. Each aggressively bids for licenses and has had significant successes with such products.

121. Much of Topps's merchandising success (as to all of its products) has been a result of its use of a direct sales force, which calls on retailers directly. Fleer markets its products through gum and candy brokers, who sell the products of many different companies to wholesalers, retail chains and convenience stores. Fleer's brokers are paid on a commission basis. None has an incentive to "push" Fleer's products in particular. Topps's sales force, on the other hand, sells only Topps's products. A direct sales force is a much more effective marketing mechanism.

Collateral Estoppel

122. On January, 1962, the Federal Trade Commission filed a complaint against Topps under § 5 of the Federal Trade Commission Act (15 U.S.C. § 45). The F.T.C. alleged that Topps had "completely foreclosed competitors from the . . . baseball picture card market by entering exclusive picture card contracts with almost all major [and minor] league baseball players. . . .", and had "created and effected a monopoly in the manufacture and distribution of baseball picture cards. . . ." 67 F.T.C. 744, 745-6 (1965).

123. The F.T.C.'s Hearing Examiner found that Topps had monopolized baseball cards as separate articles of commerce in violation of § 2 of the Sherman Act and § 5 of the Federal Trade Commission Act. 67 F.T.C. at 833-4. The Hearing Examiner's Findings of Fact indicated that Topps had aggressively and persistently acquired and protected its exclusive rights to market baseball cards alone or with bubble gum in much the same way that it does at present. 67 F.T.C. at 826-33.

124. The full Commission reversed the Hearing Examiner's finding of liability. It found that the relevant market was not baseball cards sold alone, but rather "baseball picture cards sold to the consumer in combination with other products." 67 F.T.C. at 839. The Commission held that Topps did not monopolize the market as the Commission defined it, because baseball cards could be sold in combination with a variety of low cost items without violating Topps's exclusive rights. 67 F.T.C. at 839-40.

125. The Commission's finding on relevant market is remarkably similar to the market found by this Court to exist at present. Compare Findings 87 and 124, *supra*. The Commission's findings are, however, outdated in some

respects. The Commission found that "Plainly, the real commercial significance of such cards is as a promotional device" to bubble gum. 67 F.T.C. at 838. At that time, Topps's standard package consisted of five cards and a slab of gum. Now, Topps's standard package consists of 14 cards and a smaller piece of gum, and it is clear that the *cards*, and not the gum, are the principal attraction. Moreover, there was no evidence before the Commission that indicated that Topps would challenge low cost non-confectionary competition as an infringement of Topps's rights to sell baseball cards "alone". Hence, the Commission found that the market as it defined it was very easy to enter. Finally, the Commission did not have to consider the impact of the Association's contracts on market entry, because the Association's licensing program did not yet exist.

126. The Commission also held that Topps's contracting efforts in the minor and major leagues were not an unfair method of competition under the Federal Trade Commission Act, because "it should not take Fleer or some other firm long to shake [Topps's] hold by competing vigorously for new minor league players as well as for major leaguers as their contracts with [Topps's] expire." 67 F.T.C. at 842.

127. The F.T.C. did *not* consider whether it would have been reasonable to have expected competitors to have made a direct assault on Topps's contracts if such competitors could *not* have sold baseball cards with a low cost non-confectionary product. The F.T.C. assumed that the latter avenue of competition was entirely open.

128. Conditions in the baseball card market have changed significantly since the F.T.C. made its findings in 1965. Market conditions and the conduct of the competitors were different then than they are now.

Cost of Premiums

129. One factual finding requires special elaboration because a significant part of the Court's legal analysis depends upon it. That finding is that, to compete with Topps, a competitor would be required to market a baseball card product approximately equal to Topps's product on a price per card basis. That finding is an inference based on the trial evidence. The salient evidence from which that inference is drawn is as follows:

1. Eighty to ninety percent of those children who purchase baseball cards are aware of the price. (DT 5381, Tables 4, 18, 19; pts. II C, D.)

2. Roughly two thirds of baseball cards purchased are purchased by "heavy" buyers—i. e. those who purchase more than 200 cards per year. (P-161).[2] Such buyers are more likely to be aware of the precise contents of the package, including price and number of cards, than those who buy fewer packages.

3. About 93% of baseball card consumers buy some cards themselves; 69% buy most or nearly all themselves; 85% buy half or more themselves. (P-161). The consumer, who is the person likely to be aware of the contents, and the purchaser are, in large measure, the same person.

4. Only about 3% of baseball card buyers begin collecting to obtain the gum. (P-161, Table 38) The cards themselves are what the children want most.

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2. The "⅔" figure was based on responses from 802 children contacted about the study that is summarized in P-161, not the 600 children who ultimately figured in this study. The "⅔" figure is apparently based on an estimate of 200 cards per heavy buyer; 125 per medium buyer; and 25 cards per light buyer. (P-161, p. 2; also DT 5381, p. 13).

5. The most often mentioned reason for ceasing to buy baseball cards is cost. (P-161, Table 21).

6. The most often mentioned reasons for collecting baseball cards are to "get favorite players" and to "learn about players" (P-161, Table 26). For a child to obtain his favorite players in a full series of cards he must buy a relatively large number of cards, unless he is lucky in his early purchases. In collecting a large number of cards, it is likely that he will seek the greatest number of cards for the least money.

7. Topps is an experienced, entrenched producer with significant competitive advantages over new entrants, by virtue of its market position.

130. The evidence shows that most baseball card buyers are aware of the attributes of Topps's product and its price. Moreover, the general intent in buying the package is to get the cards, in collectable numbers. A competitor could not reasonably compete with Topps's product with a premium higher in cost than Topps's gum, because the cost of the premium would necessarily raise the price of the package. The product would not, therefore, meet the child's wants as economically as Topps's product is able to. An exceptionally attractive premium might overcome part of a cost disadvantage, but the chances of finding an exceptionally attractive non-confectionary premium are reduced by the hit-or-miss "fad" nature of novelties marketing. Certainly, competitors might be able to divert some business from Topps by selling baseball card packages containing higher cost premiums, but to be truly competitive over the long run, only a competitively priced baseball card package (i. e., competitive on a price per card basis) would survive in the marketplace.

Thus, Topps's policy of objecting to "sham" products does more than simply protect its rights. Because of the way that that policy has been applied by Topps and the Association, *effective* competition to Topps has not been possible.

CONCLUSIONS OF LAW

The Court has subject matter jurisdiction in this matter under 28 U.S.C. § 1337, and has personal jurisdiction over the parties.

Statute of Limitations-Standing

Topps has raised two technical defenses to Fleer's § 1 and § 2 damage claims which require brief discussion. Topps contends first, that Fleer's claim is barred by the statute of limitations; second, that Fleer does not have standing under § 4 of the Clayton Act, 15 U.S.C. § 15, to bring a suit for damages, because it has not suffered injury to its business or property because of any conduct of Topps.

The statute of limitations for this action is 4 years. 15 U.S.C. § 15b. Thus, Fleer must show that Topps and the Players Association have engaged in the conduct of which Fleer complains within the statutory period. If, within the statutory period, the defendants *have* engaged in the conduct that is alleged, the Court can proceed to determine whether that conduct violates the antitrust laws. *Poster Exchange Inc. v. National Screen Service Corp.*, 517 F.2d 117, 124-8 (5th Cir. 1975). Fleer has shown that Topps, within the statutory period, entered into renewals of the allegedly restrictive contracts with the players; renewed its royalty agreements with the Players Assocation; and refused to waive its exclusive rights at Fleer's request. The Players Association likewise renewed Commercial Authorizations with its members, and ex-

tended the royalty agreement with Topps within the statutory period.

Topps argues that Fleer is also required to show injury within the statutory period, and the argument is perhaps valid. See *Saunders v. National Basketball Association*, 348 F.Supp. 649, 652 (N.D. Ill. 1972). That is, Fleer arguably must show that it suffered injury to its business or property i.e. had standing-within the limitations period, or be barred by the statute of limitations. Because Fleer has shown that its standing to bring suit existed, if at all, during the limitations period, we may properly turn directly to the question of Fleer's standing.

Section 4 of the Clayton Act sets forth a basic prerequisite to suit which each antitrust plaintiff must meet: "Any person *who shall be injured in his business or property by reason of anything forbidden in the antitrust laws* may sue therefor in any district court of the United States . . .", 15 U.S.C. § 15 (emphasis supplied). Topps argues that Fleer has not proved that it has been damaged by any unlawful conduct of Topps.

Fleer responds, correctly, that injury to business or property may be proved indirectly as well as directly. The Fifth Circuit has recently summarized how indirect proof of injury may be made:

> "Of course, one need not have an actual going business to establish a private antitrust injury under 15 U.S.C. § 15. Recovery can be had for a wrongfully frustrated attempt to enter a business. . . . There are 'two significant requirements' for establishing such an entitlement to recovery: (1) an intention to enter the business and (2) a showing of preparedness to enter the business. *Martin v. Phillips Petroleum Company*, 365 F.2d 629 (5th Cir. 1966) . . . .
>
> In *Martin v. Phillips Petroleum Company*, 365 F.2d at 633-34, this Court listed four elements of preparedness: (1) 'the ability of plaintiff to finance

> the business and to purchase the necessary facilities and equipment'; (2) 'the consummation of contracts by the plaintiff'; (3) 'affirmative action by plaintiff to enter the business'; (4) 'the background and experience of plaintiff in the prospective business'. . . ."

Hayes v. Solomon, 597 F.2d 958, 973 (5th Cir. 1979) [3]

Fleer has shown that it met three of the four elements of preparedness. It had the ability to finance and the necessary equipment for baseball cards; it took affirmative action to enter the business by putting forth its 5″ × 7″ proposal; and it had background and experience in the prospective business. It did not consummate contracts in its attempt to enter, but, of course, its chief complaint here is that the defendants have erected unreasonable obstacles to its doing so.

As noted earlier, Topps did not have the right to prevent the Players' Association from licensing sales of player likenesses of 5″ × 7″ or larger. As to such products, Topps retained only a right of first refusal, i.e., Topps could prevent licensure of a 5″ × 7″ product to another company by agreeing with the players to market a 5″ × 7″ product itself.

Topps argues that because it did not exercise its right to object to Fleer's 5″ × 7″ proposal, its conduct did not frustrate Fleer's only apparent attempt to enter the market. Therefore, Fleer arguably did not suffer injury at the hands of Topps.

Topps's argument is superficially plausible, but it misconstrues the import of Fleer's attempt to enter the player likeness marketplace, and misconstrues the "affirmative action . . . to enter" requirement. Fleer's 5″ × 7″ proposal was designed to *avoid* conflict with Topps's exclusive

3. See also Triangle Conduit and *Cable Company v. National Electric Products Corp.*, 152 F.2d 398 (3d Cir. 1945).

rights. The proposal reflected both preparedness and an intention to enter the baseball card market, *and* a judgment that a frontal assault on Topps's contracts would be impractical. Topps can hardly argue that it did not frustrate Fleer's attempt to enter the business, or that Fleer suffered no injury from Topps's conduct, simply because Fleer chose to attempt entry by way of a route likely to avoid the obstacles constructed by Topps.

Denial of all opportunity to compete is an "injury" under § 4. That is the injury that Fleer has alleged and proved. The "preparedness and intention" doctrine of standing was designed to permit excluded competitors to challenge their exclusion without being first required needlessly to incur economic harm.

Certainly had Fleer not made its 5″ × 7″ proposal, its standing would be in doubt. "Affirmative action by plaintiff to enter the business" is, in the Court's view, a necessary prerequisite to suit, in a way that perhaps the other three indicia of preparedness, listed *supra.*, are not. Otherwise, a company could bring suit without any showing that it was a bona fide competitor "waiting in the wings." However, there is no requirement that the affirmative attempt to enter be frustrated directly by the alleged antitrust violation, so long as the gravamen of the complaint is that the alleged antitrust violation has prevented direct attempts at entry, and so long as the *injury* that is alleged is the proximate result of exclusionary practices.

Fleer's affirmative attempt at entry fully reflected preparedness and intention to enter the market and Fleer has standing to bring this suit. Cf. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

Relevant Market

Fleer alleges that Topps has monopolized and unlawfully restrained trade in a relevant economic market, de-

fined by Fleer as baseball cards sold alone or in combination with chewing gum, candy or confections. Topps denies that it has sufficient market power to monopolize or restrain competition in the market as defined by Fleer; and argues that, in any event, the relevant economic market includes all gum, candy, novelties and low cost children's treats sold in retail outlets catering to children.

The Court has concluded that Topps and the Players Association have unlawfully restrained and monopolized trade in a relevant economic submarket, namely pocket size pictures of active major league baseball players, sold alone or in combination with a low cost premium, at a price of 15 to 50 cents.

To prove its § 1 claim Fleer must show, generally speaking, that the defendants unreasonably restrained trade. See *Chicago Board of Trade v. United States*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918); *Continental T. V., Inc. v. GTE-Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). To prove its § 2 claim, Fleer must show that the defendants possessed and exercised the power to control prices or exclude competition. *United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264 (1956).

An antitrust plaintiff cannot, however, prove a defendant's ability to restrain or monopolize trade without also proving that the defendant is able to do so in a relevant economic market. Otherwise, its economic power does not threaten harm to consumers or to competition. A finding as to the definition of the relevant economic market is therefore required both under § 1, *American Motor Inns, Inc., v. Holiday Inns, Inc.*, 521 F.2d 1230, 1247 (3d Cir. 1975), and under § 2. *duPont, supra.*

Determination of the relevant market is central to this case, as it is in many antitrust cases, because market definition is crucial to determining the reasonableness or un-

reasonableness of a firm's market power in light of the policies underlying the antitrust laws. If the relevant economic market in which baseball cards are sold is, as Topps argues, all gum, candy, novelties and low cost children's treats sold in retail outlets catering to children, Topps and the Players Association have neither the power nor the ability to monopolize or unreasonably restrain trade in the market. If, on the other hand, the relevant market is, as Fleer contends, baseball cards sold alone or in combination with bubble gum, the ability of Topps and the Players Association to exclude competitors is magnified considerably.

The Court takes considerable guidance from the analysis in *Brown Shoe Co. v. United States,* 370 U.S. 294, 325, 82 S.Ct. 1502, 1524, 8 L.Ed.2d 510 (1962):

> "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. *United States v. E. I. duPont de Nemours and Co.,* 353 U.S. 586, 593-595, 77 S.Ct. 872, 877, 1 L.Ed.2d 1057. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."

It appears that Topps may have defined the "outer boundaries of a product market", i.e. the "treat" market. There is some interchangeability of "use" among all of the

items on a typical candy rack. It is apparent to the Court, however, that Topps's proposed market is not meaningful for any antitrust purpose.

The Court's findings of fact on the submarket question are set forth earlier. To summarize, the Court found that the public recognizes baseball cards as a separate market. Baseball cards have very peculiar characteristics and uses. Baseball cards require distinct production facilities, especially the contracts needed to market the product. Baseball cards are purchased by distinct customers. Finally, baseball cards are sold through specialized channels of distribution.

Baseball cards do not meet a few of the *Brown Shoe* criteria. They have not been shown to be recognized in the industry as a separate market; they do not have distinct prices; sales of baseball cards are sensitive to large price changes, but it is not clear whether they are sensitive to small changes.

On balance, we hold that baseball cards are a distinct submarket of whatever larger gum, candy and novelty market may be said to exist, and we do so for a number of reasons other than, and in addition to, the *Brown Shoe* criteria.

First, baseball cards differ from other "treats" in that their sales are highly seasonal. Consumers' interest in baseball cards exists almost exclusively during the spring. They have a "get'em while they're hot" appeal which enhances their attraction vis-a-vis the year-round items on a candy rack. Second, baseball cards, unlike most successful novelty items, are truly perennial and not merely "fads". Children expect them to re-appear each year. Third, as will be discussed at greater length *infra.*, Topps is not required to engage in any significant non-price competition to maintain its market position in baseball cards. It sells one basic type of baseball card. Such an absence

of planned product differentiation indicates that baseball cards are sufficiently different in function from other gum, candy and novelties to sell well without further differentiation. No close substitutes (in qualitative terms) exist.[4]

Finally, the plaintiff's evidence on cross-elasticity of demand corroborates the Court's submarket definition. Fleer showed that a comparison of gross sales of likely substitutes should show reciprocal sales movement. That is, as sales of substitute A rise, the sales of substitute B should fall. Fleer demonstrated that its analytical technique is valid at least in the bubble gum market. As sales of soft bubble gum made huge gains in recent years, sales of traditional hard bubble gum declined dramatically. The function that bubble gum serves can be met by different, eminently substitutable products.

Sales of baseball cards, however, are unaffected either by sales of other trading cards (the most likely functional substitutes) or by sales of bubble gum.[5] That evidence

4. Continuous product differentiation *can* be an earmark of a competitive market structure, assuming a non-expanding market. Automobiles, for example, which we can presume to be in a relevant economic market (comprising, perhaps a number of submarkets) are endlessly differentiated. Where consumers can substitute freely, producers seeking to increase their market share often differentiate their products, to try to gain a larger slice of a fixed pie. A monopolist, on the other hand, is, by definition, the sole or dominant producer in a market. Its incentive to differentiate is not nearly as strong as it would be in a competitive market.

5. Topps argues that Fleer's proof is of little value because it was based on sales data from Topps's trading cards and gum products. Topps suggests that the data would certainly not show any significant level of substitution between baseball cards and other Topps cards, because Topps would not market a trading card which competed with—"cannabalized"—baseball cards. If Topps *concedes* that Charlie's Angels cards are not substitutes for baseball cards, it is difficult to see how it can argue that a Baby Ruth bar *is* a substitute for the cards. Topps either believes its "treat"

corroborates a crucial fact in the case: there is no product on the market which meaningfully substitutes for baseball cards over the long run for purposes of their *principal* function, i. e. fulfilling a child's desire to learn about players and to collect and trade their pictures.

Defining a market is the process of determining what products substitute for each other for the "same purposes". *duPont, supra.*, 351 U.S. at 395, 76 S.Ct. at 1007. Virtually every product sold, however, can be said to have a number of uses, some more general than others. Ultimately, market definition must be concerned with the *principal* use of a product. Consumers most need the benefits of competition when they purchase a product to use it for its principal function. More general functions are much more likely to be able to be performed by a variety of only marginally competitive products.

A child may buy hundreds of candy bars or packages of gum each year, but those purchases do not affect his long-term plans to learn about players and to collect and trade their pictures. A candy bar may substitute for baseball cards once, or twice, or more often, depending upon a child's appetite or his desire for a treat; but a candy bar is not a substitute for baseball cards over time. Children, like adults, meet different needs with different purchases, and to say that a "treat" market is relevant for antitrust purposes, because the items on a candy rack substitute for one another in the "treat" function, is to say that "nutrition" is a relevant market for antitrust purposes because most of the items in a supermarket at one time or another serve as substitutes, depending on the meal plans of consumers.

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5. (Cont'd)

definition of the relevant market or it does not, but we fail to see how Topps can leave all of its own trading card products out of that proposed market, *except* for baseball cards.

Topps did prove that there is some substitution among the items on a candy rack, but it did not rebut the plaintiff's showing that a submarket exists. As *Brown Shoe, supra,* makes clear, proof of some price cross-elasticity and some substitution among products does not necessarily demonstrate the existence of a relevant market for antitrust purposes, nor does it mean that consumers are not suffering from an absence of competition in a relevant submarket.

A submarket is certainly as difficult to define as a market, but the need for the submarket concept is apparent, especially in a § 1 case. Serious anti-competitive effects can escape unremedied if all products which exhibit some price cross-elasticity must be grouped in the same broad product market. Not all of the ill-effects of an unreasonable restraint of trade or of monopolization in a submarket are ameliorated by whatever price competition the product faces in a broader market. In the case of baseball cards, the ill-effects of an absence of competition in the submarket have been significant, as the discussion, *infra,* will show.

The Section 1 Claim

A.

The plaintiff has alleged that Topps and the Players Association have unreasonably restrained trade in a relevant economic market in violation of § 1 of the Sherman Act. There is no question that Topps's contracts with the players restrict competition in a significant part of the market. Under those contracts, Topps's right to sell cards alone or with gum, candy or confection is exclusive, which means, of course, that competitors cannot market a product identical to Topps's product. Competitors who seek to enter the baseball card market thus have only two op-

tions: they can compete directly with Topps for contracts with the players, or they can seek a license from the Players Association to market baseball cards with a product other than gum, candy or confection, that is, a "non-confectionary" product.

The ability of a competitor to compete directly with Topps for contracts with individual players is discussed *infra*. We turn first to the issue of non-confectionary competition.

Fleer has argued that non-confectionary competition is impossible because Topps and the Association have barred entry by non-confectionary competitors. Topps has allegedly accomplished that objective by raising the possibility of contract infringement suits against any company which might hope to market baseball cards with a *low cost* non-confectionary product.

The Court and the parties have come to call that threat of suit the "sham product" issue. Topps's contracts with the players give Topps exclusive rights to sell the players' pictures "alone or in combination with chewing gum, candy or confection." The contracts do not in any way mention or explicitly restrict sales of baseball cards "in combination with" non-confectionary products. Nevertheless, were a competitor to sell baseball cards with a non-confectionary product so small in value as to be virtually worthless, that competitor would, in effect, be infringing Topps's exclusive contractual rights to sell baseball cards "alone".

Topps's principal defense to this suit has been that there are a "host" of non-confectionary items with which baseball cards can lawfully be sold. (Topps does *not* say what the minimum value of a non-confectionary product must be, in its view, to avoid infringement of Topps's rights). Topps's defense rests on a single premise: that baseball cards sold with non-confectionary products would

provide meaningful competition to Topps's standard product. The Court has found, as a factual matter, that Topps is correct. However, only a certain type of non-confectionary combination would be successful. To be competitive with Topps a competitor must be able to match or approach Topps's price per card. For a competitor to do so, the non-confectionary product to be included with the baseball cards would have to be similar to Topps's gum in production cost. Otherwise, Topps's market dominance and comprehensive player rights, in conjunction with a lower price per card, would pose a nearly insuperable obstacle to meaningful competition.

Because Topps's exclusion of confectionary competition is reasonably clear, Fleer's § 1 claim turns on the question of whether the defendants have combined to restrain trade unreasonably by prohibiting or discouraging sales of baseball cards in combination with low cost non-confectionary premiums. Fleer has proved that they have.

B.

Topps holds exclusive rights to the sale of baseball cards alone or in combination with gum, candy or confection. The Players Association is, at the moment, Topps's chief competitor, because it holds all of the rights needed to market a competing set of baseball cards sold in combination with non-confectionary products for non-confectionary rights (as Topps has done with confectionary rights), because the Players Association has, under the terms of its commercial authorizations, opposed and would oppose any such effort.[6] Hence, if a competitor seeks to

6. The Players Association has represented that it would not oppose individual contracting efforts directed toward acquiring the rights now held by Topps, i. e. the rights to sell baseball cards alone or with gum, candy or confection. The Association would oppose any other attempt to acquire group rights through individual contracting.

compete with Topps by marketing a non-confectionary baseball card product, it can only do so by obtaining a group license from the Players Association. The Association refuses to grant licenses for the sale of baseball cards with lost cost non-confectionary products, because, in its self-interest, it wishes to avoid conflict with Topps's rights. It also wishes to avoid lessening its royalty income from Topps's products.

The effect of this odd combination of interlocking rights and conduct has been to exclude completely any meaningful competition to Topps.

The plaintiff must prove, by a preponderance of the evidence, that the defendants have engaged in some "concerted" unlawful action. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977). Topps's defense has been that it merely exercised its lawfully held contractual rights, without trying to expand them unlawfully, and that the Players Association was solely responsible for foreclosing non-confectionary competition with Topps.[7]

Topps's position is a little like that of the boy who killed both his parents, later to throw himself on the mercy of the court because he was an orphan. Topps's exclusive contracts foreclose all but a small slice of the market, and Topps has pursued a policy of objecting to "sham" non-confectionary products; yet, it seeks to attach sole responsibility for market foreclosure on the Association. What-

7. Much of the discussion that follows in the text centers on the defendants' concerted conduct with respect to non-confectionary competition. The Association did not assist Topps in signing baseball card contracts with minor league players, and therefore arguably did not act in concert with Topps as to foreclosure of much of the market. We do not believe that competitors may escape § 1 liability by arguing that their *joint* conduct (if any) foreclosed only a small part of the market and that *unilateral* conduct foreclosed the rest. In any event, the Association did at times act in concert with Topps to protect Topps's rights under Topps's player contracts. See, e. g., Finding 22, *supra*.

ever the words "contract combination or conspiracy" mean must apply to the combination shown in this case. Not to call these interlocking exclusive contracts a "combination" would be to close one's eyes to reality.

The joint unlawful conduct in this situation can be summarized in one sentence. Topps and the Players Association have acted jointly in excluding Topps's competitors.

Each party has had an interest in excluding, and has acted to exclude, producers of baseball cards to be sold with low cost premiums. Topps has had that interest for an obvious reason it did not want direct competition. Topps received an implicit warning from the F.T.C. in 1965 to the effect that Topps could have been found to have been a monopolist if it were not for the ease with which competitors could enter the market with "sham" products. Nevertheless, Topps has pursued a policy of advising the Association and competitors that Topps would vigorously oppose the sale of baseball cards either with confectionary premiums *or* with low cost non-confectionary items. Topps has also refused and continues to refuse to define what a "sham" product is, engendering further uncertainty in competitors' minds.

The Players Association shared Topps's interest in excluding confectionary and low cost non-confectionary competition in part because it wanted to avoid legal conflict with Topps's rights. P-1, the Agreement between Topps and the Players Association relating to royalties paid to the Association from the sale of Topps's baseball cards, was the device that made the Players Association self-imposed restraint possible. Topps agreed to finance, as it were, the Players Association's cautious approach to the licensing of baseball card products that would have competed with Topps's product.[8]

8. The Players Association was cautious only in licensing "baseball card" products. With respect to any products that competed less directly with Topps's standard package, such as where

An uncompromised competitor of Topps would have had an interest in testing the breadth of Topps's rights. If the Players Association had not shared in Topps's revenues from baseball cards, it too would have wanted to test Topps's rights to their fullest.[9] Because of the contract between Topps and the Players Association, the Players Association did not need to test Topps's rights, and the only avenue meaningfully to compete with Topps was closed. But for P-1, some low cost non-confectionary or other competitive item would eventually have been licensed by the Association.

Topps argues (rightly we think) that the Association did not act at Topps's behest in rejecting, or requesting modification in, certain low cost non-confectionary licensing proposals. Rather, the Association acted in its own interests. That fact does not change the concerted nature of the defendants' conduct. As the Supreme Court held in *Albrecht v. The Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968), a participant in an unlawful combination need not share the dominant partner's intent to achieve an unlawful result. See also *United States v. General Motors Corp.*, 384 U.S. 127, 142, 86 S.Ct. 1321, 1329, 16 L.Ed.2d 415 (1966). It is enough that the minor partner, because of an agreement with the major partner, is willing to act in a way that brings about an unlawful result.[10]

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8. (Cont'd)

the cards were sold as a premium, the Association was much more aggressive.

9. The Players Association *did* test Topps' rights in 1968, which was the impetus for the signing of the agreement between Topps and the Association in the first place.

10. Topps cannot rely on the fact that the contract between it and the Players Association was signed only because of pressure by the Association. Topps elected to join 'em rather than to try to beat 'em, a choice which is, of course, subject to § 1 scrutiny.

C.

This is a "Rule of Reason" case. *See Chicago Board of Trade v. United States, supra; Continental T. V., Inc. v. GTE Sylvania, Inc., supra.*[11] In a Rule of Reason case, the Court is required to make findings as to the actual impact of the alleged anti-competitive practices on competition within the relevant market, to determine whether the practices amount to an unreasonable restraint of trade. See *National Society of Professional Engineers v. United States,* 435 U.S. 679, 688, 98 S.Ct. 1355, 1363, 55 L.Ed.2d 637 (1978); *American Motor Inns, Inc. v. Holiday Inns, Inc., supra,* 521 F.2d at 1247, n. 46 (and cases cited). In this case, the anti-competitive effects of Topps's present uncontested market position are striking.

There is a serious, and in the language of the cases, "pernicious" effect on non-price competition which results from Topps's position in the baseball card submarket. The ways in which Topps is *not* challenged by competition are bounded only by one's imagination.

Topps does not face competition from player stickers, analogous to Fleer's team logo stickers, because Topps holds the right to use players' likenesses on such a product.

10. (Cont'd)

In any event, Topps showed that it had the power to resist most of the Association's demands, and, as a last resort, could have placed the antitrust consequences of the Association's influence with the players in issue. Topps was not *required* to sign P-1; rather, it chose to.

11. Although the plaintiff argues that the group boycott rubric applies to the facts of this case, and that therefore Topps is committing a per se violation of § 1, the facts do not support the plaintiff's contention. The group boycott label is best applied to concerted refusals to deal with a given competitor, entered into by a group of competitors. Cf. *Klor's Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959). The facts of this case simply do not show any per se violations of the antitrust laws.

Topps does not face competition from decals depicting major league players. No baseball cards or player likenesses are marketed nationwide in packages containing only those players on a given team. No baseball cards or player likenesses are marketed in packages containing only players in a given league, i. e. National or American. No baseball cards are marketed which include statistics on stolen bases or fielding percentage, game winning hits, successful sacrifice attempts, or any number of other statistics which a competitor might choose to offer to attract baseball card purchasers. All-star pacakages are not marketed. There is nothing in the record to indicate that consumers wish to purchase a large number of packages before finding cards of players in whom they are interested. Certainly, there are some collectors who want to collect cards in exactly the way that Topps sells them, but Topps, by its marketing strategy, insists that *all* baseball card purchasers collect their favorite players in a hit-or-miss manner.

Nor should the absence of price competition be ignored. The evidence shows that Topps has often sold its non-sports trading cards at a price slightly below its sports trading cards. Obviously, a competitor might choose to market a baseball card package lower in price than Topps's package.

Such effects of an absence of competition in the baseball card submarket are both unnecessary and unreasonable.

Topps and the Association have both argued that their contracts with players do not unreasonably restrain trade because the contracts are for fixed, rather than indefinite terms. It has been suggested that Fleer, or any other competitor, may compete in the baseball card market by approaching individual players and outbidding Topps or the Association for their respective contractual rights.

Under very optimistic assumptions, a well-financed competitor who could bid as successfully as Topps in player-by-player competition for contracts could market a bubble gum and baseball card product in six or seven years. Under similarly optimistic assumptions, a competitor who could persuade players not to renew their standard commercial authorizations, insofar as the commercial authorizations apply to baseball card rights, might be able to market a non-confectionary baseball card product in about three years. That would depend upon whether a court would construe Topps's contracts to permit players to sign non-confectionary agreements during the term of their Topps contracts. (See Finding 95, *supra*.)

The Court, as finder of fact, is asked to find that an otherwise unreasonable combination in restraint of trade is "reasonable" because it need only last seven, or perhaps three years. Different finders of fact would perhaps react differently to such an argument. This Court finds it wholly unpersuasive, at least on the present record.

Topps and the Association understandably value their exclusive rights highly. Those rights represent certainty and likely profitability for years into the future. The rights have not, however, promoted competition, which, in light of the serious restraints that they have created, is the only attribute that might have made them reasonable.

In the future, the Association's group licensing power is likely to be a major factor in guaranteeing competition to Topps, as the Court's discussion of remedy will suggest. We cannot, however, accept the notion that the defendants' restrictive behavior was really not unreasonably anti-competitive, because, all along, a well-financed competitor might have been able to overcome it in three to seven years.

It was apparent both to Topps and the Association that their contracts foreclosed most of the possible avenues

by which competitors might have competed in the baseball card market. Their conduct in excluding competition from baseball cards sold with low cost premiums no matter how it might be characterized in the abstract, was, in those circumstances, unreasonable.

Section 2

Although this case was litigated in part as a § 2 case, the facts as they have developed seem better suited to analysis under the § 1 "combination in restraint of trade" rubric. Nevertheless, § 2 has been asserted as a grounds for liability, and it is the Court's duty to reach the § 2 claim.

For virtually the same reasons that the defendants have been found to have violated § 1 of the Sherman Act, they are also liable under § 2. The defendants' respective contracts with the players and the defendants' dealings with each other have operated to foreclose the entry of competitors into a relevant market. Section 2 is therefore implicated.

Monopoly power is the power to control prices or to exclude competition in a relevant market. *United States v. E. I. duPont de Nemours, Inc., supra,* 351 U.S. at 391-2, 76 S.Ct. at 1004-05. The plaintiff in this case has not proved that Topps has the power to control prices (although we cannot say that that power does not exist), but it has proved that the defendants possess and have exercised the power to exclude competition in baseball cards. Where monopoly power and its exercise can be shown, a violation of § 2 has been established. See, e.g., *United States v. United Shoe Machinery Corp.,* 110 F.Supp. 295, 346 (D. Mass. 1953) (Wyzanski, J.), *aff'd* 347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910 (1954).

This case is somewhat unusual in that the alleged monopoly comprises two economic actors rather than one. It therefore falls outside many of the cases dealing with

single firm monopolies. Section 2, however, proscribes multi-firm monopolies by its express terms:

> "Every person who shall . . . combine or conspire with any other person or persons to monopolize . . . shall be [liable under this Section]".

It is often said that, to prove a combination or conspiracy to monopolize "there must be a specific, subjective intent to gain an illegal degree of market control." *American Football League v. National Football League,* 323 F.2d 124, 132, n.18 (4th Cir. 1963); *Lewis v. Pennington,* 400 F.2d 806 (6th Cir. 1968); *Woods Exploration & Production Co. v. Aluminum Company of America,* 438 F.2d 1286 (5th Cir. 1971). The parties have not sufficiently framed the question of specific intent to permit the Court to make a reasoned determination as to whether it existed, but, in any event, the Court holds that such a finding is not required in this case.

Close examination of the cases requiring proof of a specific intent where conspiracy to monopolize is alleged, reveals that such a finding is required only where monopoly power itself has not been proved.

> "[A] specific intent to accomplish an unlawful result is necessary *where monopoly power has not been obtained* and the charge is an attempt or conspiracy to monopolize."

Lewis v. Pennington, supra, 400 F.2d at 811 (emphasis supplied).

Where conjoint monopoly power has been shown to exist, and proof of the exercise of that power has likewise been made, the members of the combination may be held liable under § 2 *absent* proof of specific intent:

> "It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the antitrust laws have been vio-

> lated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements [citations omitted]. To require a greater showing would cripple the Act. As stated in *United States v. Aluminum Co. of America*, 2d Cir., 148 F.2d 416, 432, 'no monopolist monopolizes unconscious of what he is doing.' *Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act.*
>
> • • •
>
> [In this case] [m]onopoly rights in the form of certain exclusive privileges were bargained for and obtained. These exclusive privileges, being acquired by the use of monopoly power [but without specific intent] were unlawfully acquired. The appellees, *having combined with each other and with the distributors to obtain those monopoly rights formed a conspiracy in violation of §§ 1 and 2 of the Act.*"

United States v. Griffith, 334 U.S. 100, 105, 109, 68 S.Ct. 941, 944, 946, 92 L.Ed. 1236 (1948) (emphasis supplied).

The analysis suggested by the Court in *Griffith* is particularly applicable to this case. Topps and the Players Association have combined (i. e. have acted in a concerted manner) to exercise their power to exclude Topps's competitors from the baseball card market. In other words, they have combined to exercise monopoly power. Where monopoly power exists by virtue of a § 1 "combination in restraint of trade" the proof of concerted action that is required to prove a violation of § 1 will support a finding of liability under § 2.

We hasten to point out that, while the principles enunciated in *Griffith* are directly applicable to this case, the facts are distinguishable in one respect. There, each

member firm of the § 2 combination possessed some "monopolies" of its own in its one-threatre towns. In this case, it is arguable that neither Topps nor the Association has monopoly power by itself.

The distinction is not significant in a way that can alter the § 2 result in this case.[12] Together, Topps and the Players Association have all of the market power there is in the baseball card market; and they have unlawfully exercised that power in a way which has left the Topps product alone in the market. We hold, in this nearly *sui generis* situation,[13] that the defendants are liable for their possession and exercise of monopoly power, that is, the power to exclude competition. Further, we hold that no determination of specific intent is necessary on the facts of this case.

Collateral Estoppel—Unclean Hands

Topps has raised the defense of collateral estoppel, arguing that the facts found by the Federal Trade Commission in 1965, in *In re Topps v. Chewing Gum, Inc.*, 67

12. The distinction between *Griffith* and this case is not, in any event, much of a distinction. The importance of the single town "monopolies" in *Griffith*, was not that their existence permitted the invocation of the "monopoly" statute. Rather, the Court was concerned about the anti-competitive market power that was achieved when isolated, otherwise lawful market advantages were used in aggregation. Each defendant here, as in *Griffith*, possesses considerable market power of its own. In this case the market power is not, strictly speaking, a result of an aggregation of small "monopolies". Rather, the market power is a result of the exclusive rights secured by means of the contracts in issue. We do not believe that § 2 applies more to the aggregation of market advantages shown in *Griffith* than to those that exist in this case.

13. This case differs from the typical oligopoly or duopoly situation in that only one product has been marketed between two defendants. The Court expresses no view as to whether nonpredatory joint control of a market can result in a "monopoly" where *more* than one product is sold in the market. Cf. *American Tobacco Co. v. U. S.*, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946).

F.T.C. 749 (1965), are binding upon this Court now. The defense was treated at length at the pretrial stages of this case (see 415 F.Supp. 176, 182 (E.D.Pa.)), but as the proof developed it became apparent that the controlling facts of this case were not present in the F.T.C.'s case. The Association's group licensing program and its commercial authorizations did not yet exist in 1965; and the issue of what potential premiums did or did not infringe Topps's rights to sell baseball cards "alone" had not been framed for the F.T.C. in the way it has been here.

Collateral estoppel applies only if "the controlling facts and applicable legal rules remain unchanged." *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 846 (3d Cir. 1974), quoting *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 599, 68 S.Ct. 715, 720, 92 L.Ed. 898 (1948). Circumstances in the baseball card market have changed dramatically and materially since 1965, and the defense of collateral estoppel is therefore unavailable to Topps. Hence, we need not reach the difficult question of whether § 5(e) of the Federal Trade Commission Act makes collateral estoppel unavailable to Topps as a matter of law.[14]

Topps has also raised the equitable defense of unclean hands. Topps alleges that Fleer behaved improperly with respect to the F.T.C. proceeding and should therefore be barred from relief in this case. Even assuming that all of Topps's proposed findings of fact on the unclean hands issue are true,[15] the Court does not believe that they would justify barring Fleer from equitable relief.

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14. § 5(e) of the Act provides that "No order of the Commission . . . shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts."

15. Topps alleges, on somewhat thin evidence, that Fleer intentionally deceived the Federal Trade Commission, and tried to use the F.T.C.'s proceeding improperly for Fleer's commercial advantage. The evidence is dated, equivocal and unpersuasive.

Damages

Fleer has proved that, as a proximate result of the unlawful concerted acts of the defendants, it was denied any meaningful opportunity to compete for the rights to market a baseball card product which would have competed with Topps's standard product. Having proved those facts, Fleer is entitled to some form of relief. One who has sought to compete but who has been prevented from competing by the unlawful acts of others, has suffered *exactly* the sort of "injur[y] to his business or property" which the antitrust laws were designed to remedy. The law does not, of course, guarantee every firm's success in the marketplace. Fleer, however, has been unlawfully prohibited even from *competing*. Its standing is not, in the Court's view, seriously in doubt. Nevertheless, proof of the *fact* of injury sufficient to confer standing under §§ 4 and 16,[16] is not the same as proof of any particular amount of damage sustained. Cf. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562, 51 S.Ct. 248, 250, 75 L.Ed. 544 (1931).

Fleer made a serious effort to show the amount of damages it has sustained because of its exclusion from competition in the market. The Court need not detail all of the ways it examined Fleer's proof to arrive at a plausible estimate of actual damage sustained. *See Zenith Radio Corp. v. Hazeltine Research, Inc., supra.*, 395 U.S. at 123-5, 89 S.Ct. at 1576-77. It is enough to say that, to be recoverable, damages must be in some way provable. Every conceivable valuation of Fleer's losses in this case depends on an unacceptable amount of speculation.

16. There is significant dispute in the case law as to whether a lesser showing of injury is required to attain § 16 standing than to attain § 4 standing. Because Fleer has shown that its standing exists both as to past and threatened injury, we need not reach the question.

Fleer is not a particularly robust company at the moment. Its sales are roughly a fifth of those of Topps; both companies have been suffering from the introduction of soft bubble gum by larger competitors. Fleer might have made some profit on baseball cards. On the other hand, it might well have lost money.

The object of an award of damages is to place the injured party in the position he would have occupied but for the acts of the defendants. Here, even absent unlawful conduct by the defendants, Fleer would have faced two obstacles between it and its first dollar of profit. First, it would have had to obtain a license from the Association to market a set of cards. Second, it faced the significant market power of a firmly entrenched competitor.

In calculating damages, the Court is willing to assume that, absent the unlawful combination, the Association would have granted Fleer a non-confectionary license for some product. However, it is also reasonably likely that the Association would have charged what the market would have borne for the license, and that the rights would have been expensive. Furthermore, Fleer has never had a great deal of success marketing trading cards of any type (Topps and Donruss are the leaders in the field), and, had it obtained an expensive license, its expertise would have been greatly tested. Fleer's distribution system is not as effective as that of Topps (Topps uses its own sales force; Fleer works through brokers and wholesalers), and Topps could have been expected to have beaten Fleer to the shelves in the spring. Finally, Topps's product has a great deal of market acceptance among retailers and consumers.

We have held that a variety of baseball card products (confectionary and non-confectionary) can be competitive with Topps's product. We cannot conclude, on the present record, that Fleer would have been the company to

succeed at the endeavor. The only supportable conclusion is that Fleer should have been permitted to try.

In a small number of well-reasoned decisions, courts have awarded nominal damages under § 4 of the Clayton Act where injury-in-fact was shown, but the amount of injury was not capable of calculation. See *Newberry v. Washington Post Co.*, 438 F.Supp. 470, 483 (D.D.C. 1977) (Gesell, J.); *Siegfried v. Kansas City Star Co.*, 193 F.Supp. 427 (W.D.Mo. 1961), *aff'd* 298 F.2d 1 (8th Cir. 1962). See also *United Exhibitors v. Twentieth Century Fox Film Distributing Corp.*, 31 F.Supp. 316 (W.D.Pa. 1940). Fleer is awarded $1 in damages, which is trebled, pursuant to statute, to $3.

The most compelling reason to award only nominal damages under § 4 of this case is that the result seems particularly fair. By means of equitable relief and an award of attorneys' fees under § 4, Fleer will be placed in essentially the position that it should have occupied before the start of this suit. It will have a fair opportunity to enter the baseball card market, facing both success and failure as possible outcomes. The defendants will be denied further benefits from their unlawful actions, but they will not be assessed treble damages based on guesswork. To the extent that the defendants, as a matter of antitrust policy, should be liable for a dollar figure for excluding *attempted* entry, an award of attorneys' fees will help to vindicate that policy.[17]

Equitable Relief

In shaping equitable relief; the Court is guided by the proposition that the relief granted should remedy those

17. Fleer has sought damages only from Topps. The Court has assumed, without deciding, that the plaintiff may seek its full damages against either defendant. The parties may argue any disagreement on that point at the hearing on attorneys' fees.

conditions which impede fair competition, without unnecessarily penalizing the defendants.

In this case the plaintiff has demonstrated that a combination of exclusive contracts and exclusionary behavior has completely foreclosed entry into a relevant economic submarket. The injunctive relief that the Court will award is intended to lift the existing restraints on free competition without impinging on the ability of either defendant to continue to compete effectively.

It is clear, and has been clear for many years, that the primary obstacles to entry into this market are the rights held by Topps under its contracts with the players. First, the exclusive right to sell cards "alone" forecloses any competitor from selling a baseball card product without a premium. Second, the exclusive right to sell cards "in combination with chewing gum, candy or confection" forecloses a competitor's use of many of the meaningful premiums with which baseball cards might be sold. Many of the novelty products on a candy rack are sold in combination with some sort of gum or confectionary item, so that the products will attract purchases from those children who want to collect baseball cards *and* eat. Topps's contracts have insured that only Topps is able to market that kind of baseball card combination. Finally, Topps's contractual right to market cards "alone" has extended its market power into the area of non-confectionary premiums. Competitors have only been permitted to market baseball cards with non-confectionary products of sufficient value to avoid infringement of Topps's claimed rights.

Topps's rights to market baseball cards are, of course, not objectionable insofar as they merely permit Topps to sell players' pictures. Rather, the rights are objectionable because they are exclusive.

By separate Order, Topps will be permanently enjoined from enforcing the exclusivity clause in its form contract, and it will be prohibited from entering into any contract with any major or minor league player that reserves to Topps any exclusive right to sell that player's picture.

Topps will also be permanently enjoined from entering into, amending, or seeking to amend any contract with any major or minor league player so as to expand the scope of the rights now held in its former contract. Topps's form renewals will not be considered amendments, but the term thereof (i. e. two years) may not be enlarged.

The Major League Baseball Players Association will be ordered to consider carefully any applications it receives for licenses to market baseball cards, and it will be required to enter into at least one such licensing agreement before January 1, 1981.[18] Fleer shall have a right of first refusal as to any such license, but only until such time as Fleer is granted a license, or until January 1, 1981, whichever occurs first.

The Players Association shall not grant any exclusive license that will limit any broad category of rights to a single firm. For example, the Association may not grant to any firm an exclusive license to sell baseball cards with any and all non-confectionary products.

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18. There was no evidence at trial which suggested that the clause in the commercial authorization prohibiting the Association from including in a group license any player committed by contract to a product competitive with the proposed license (see Finding 19, *supra.*) prevents the Association from licensing a baseball card product competitive with Topps's product. That clause has apparently been construed to limit the Association's group licensing right only where the group picture license is intended to *promote* another product. It has not been construed to prohibit the Association from licensing a company to sell pictures as a principal product.

Because the commercial authorizations contemplate exclusive licensing, however, the Players Association may enter into exclusive contracts covering sales of cards alone or with carefully and specifically described premiums. The Association may grant, for example, an exclusive license to sell baseball cards with a particular type of plastic team emblem, grape flavored bubble gum, or soft bubble gum, etc.

The Association may, of course, grant as many baseball card licenses as it chooses to grant.[19]

The Association will not be permitted to consider the revenue it derives from its agreement with Topps in deciding whether to license any baseball card product.

The Association *will* be permitted to continue to enforce its rights to prohibit companies from soliciting group rights on a player-by-player basis. In the baseball card market as it now exists, the Association's group rights are likely to promote rather than inhibit competition, so long as licenses to market competitive baseball cards are granted. Were contracting with individual players permitted (i. e. if the Association were prohibited from asserting its exclusive rights under its commercial authorizations), companies would be free to enter into exclusive contracts with individual players, and would be likely to do so. The rights to market baseball cards could become so fragmented that no meaningful competition to Topps would develop.

The Court will retain jurisdiction over the decree for a period of at least three years.

As has been noted

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19. The Court has presumed that the Association will hold group rights to license confectionary baseball card products when Topps's rights are made non-exclusive. If that assumption is incorrect, the Association will be required to advise the Court promptly.

> "When the purpose to restrain trade appears . . . it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed."

International Salt Co. v. United States, 332 U.S. 392, 400, 68 S.Ct. 12, 17, 92 L.Ed. 20 (1947). The relief that will be ordered in conjunction with these findings does *not* close every untraveled road. If, however, either Topps or the Association attempts in some way to circumvent the relief that will be granted, the plaintiff [20] will be free to move for a modification of the Order.

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20. We will not speculate on whether any other competitors might have standing to object to continued anti-competitive conduct by the defendants.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 75-1803

FLEER CORPORATION

v.

TOPPS CHEWING GUM, INC. and MAJOR LEAGUE BASEBALL PLAYERS' ASSOCIATION

ORDER

AND NOW, to wit, this 30th day of June, 1980, judgment in the above-captioned action is hereby entered in favor of the plaintiff and against the defendants, jointly and severally, in the amount of $3.00 plus costs.

The plaintiff is also entitled to injunctive relief and an award of attorneys' fees, which items of relief will be treated by separate Order.

AND IT IS SO ORDERED.

/s/ CLARENCE C. NEWCOMER
Clarence C. Newcomer, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 75-1803

FLEER CORPORATION

v.

TOPPS CHEWING GUM, INC. and MAJOR LEAGUE BASEBALL PLAYERS' ASSOCIATION

ORDER

AND NOW, to wit, this 10th day of July, 1980, in accordance with the Findings of Fact and Conclusions of Law entered in the above-captioned case on June 30, 1980, it is hereby Ordered as follows:

1. Defendant Topps Chewing Gum, Inc., is permanently enjoined from:

a. enforcing or threatening to enforce in any court or in any other manner the exclusivity clause in its form contract with major league baseball players;

b. entering into or seeking to enter into any contract with any major or minor league baseball player which reserves to Topps any exclusive right to sell that player's picture in any form or in combination with any product;

c. entering into, amending, or seeking to enter into or amend any contract with any major or minor league player so as to expand or enlarge the scope of the rights now held in its form contracts with major and minor league baseball players;

d. entering into any renewals of its form contracts with any major or minor league player for longer than two years at a time;

e. enforcing or threatening to enforce in any court or in any other manner the term in its form contracts with major and minor league players and/or with the Major League Baseball Players Association, reserving to Topps the right of first refusal as to the marketing of any product.

2. Defendant Major League Baseball Players Association shall:

a. give careful consideration to any applications it receives from persons or companies seeking licenses to market baseball cards;

b. before January 1, 1981, grant at least one license (under its group licensing program) to market a pocket-size baseball card product, to be sold alone or in combination with a low cost premium, in packages priced at 15 to 50 cents, which license shall include the right to use the name and picture of every member of the Major League Baseball Players Association who has signed a commercial authorization contract;

c. grant at least one group license (such as is described in paragraph 2b, *supra.*) to the Fleer Corporation, if the Fleer Corporation, before January 1, 1981, matches any final offer for a group license made by any person or company (in the event that no offers are received from persons or companies other than the Fleer Corporation, the Fleer Corporation shall nevertheless be granted such a license on whatever terms the Major League Baseball Players Association can negotiate under the circumstances);

d. consider granting as part of any group license granted under paragraph 2b, *supra,* the right to sell baseball cards alone (subject to any proceedings conducted under paragraph 2e, *infra.*)

e. advise the Court within ten days of the date of this Order whether the Major League Baseball Players Association will, under the terms of its commercial authorization contracts with its members, exercise the rights to consider applications for licenses, and to license any company to sell baseball cards alone or in combination with gum, candy or confection;

f. maintain at least one group license (such as is described in paragraph 2b, *supra.*) in effect for every baseball season in which the Major League Baseball Players Association conducts its group licensing program.

3. Defendant Major League Baseball Players Association is permanently enjoined from:

a. considering any revenue either it or its members derive from its royalty contract with Topps Chewing Gum, Inc. (trial exhibit P-1), in deciding what group licenses to grant under paragraph 2b, *supra;*

b. entering into any exclusive licensing agreement for the sale of baseball cards, except that it may grant exclusive licenses (exclusive in the sense that they may be the only ones of their kind issued by the Major League Baseball Players Association) to sell baseball cards with carefully and specifically described premiums in such a manner as not to vest in

any company or companies the exclusive right to sell baseball cards with any general type of premium, including, but not limited to, bubble gum, chewing gum, candy or non-confectionary items.

c. entering into any contract or licensing agreement whether designated "exclusive" or otherwise, which would diminish any non-exclusive rights held by Topps Chewing Gum, Inc.

4. In the event that Fleer Corporation, as of January 1, 1981, has not been granted a license under the terms of paragraph 2c, *supra.*, the Court will hold a hearing to determine whether the Fleer Corporation has been accorded as complete and fair an opportunity to enter the baseball card market as it would have enjoyed but for the defendants' unlawful conduct, and the Court will at that time grant appropriate relief if such relief is warranted.

5. Topps Chewing Gum, Inc. may continue to enforce its right to prohibit any player from granting to another any of the rights held in Topps's form contract until Topps's final appeals have been exhausted, except that Topps may not oppose in any court or in any manner any player's granting similar or identical rights to the Major League Baseball Players Association (see paragraphs 2e, 3c, *supra.*).

6. In the event that the Major League Players Association does not believe itself to hold the rights to license baseball cards alone or in combination with gum, candy or confection (see paragraph 2e, *supra.*), the Court will shape such injunctive relief as is required to ensure that meaningful competition as to such products will be possible.

7. The Court will retain jurisdiction over the implementation of this Order for a period of three years, which period is subject to extension (upon proper application) if circumstances warrant.

AND IT IS SO ORDERED.

/s/ CLARENCE C. NEWCOMER
Clarence C. Newcomer, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 75-1803

FLEER CORPORATION

v.

TOPPS CHEWING GUM, INC. and MAJOR LEAGUE BASEBALL PLAYERS' ASSOCIATION

MEMORANDUM AND ORDER

NEWCOMER, *J.* August 16, 1980.

The parties have moved for various amendments to the Court's Findings of Fact and Conclusions of Law of June 30, 1980, and to the Injunctive Order of July 10, 1980. For the reasons set forth below, the Injunctive Order will be modified in certain respects, but all other requests for modification or amendment are denied.

Fleer has requested that the date by which a license must be granted by the Players Association be changed to September 1, 1980. The Court has considered the request and the reasons advanced therefor, and has concluded that the target date should be moved. However, September 1, 1980 is too early to permit meaningful negotiations between the Association and Fleer. The Court has therefore settled on October 1, 1980, as the date by which the Association's first baseball card license shall issue.

The Court will also order defendant Topps to assign to the Association non-exclusive baseball card rights iden-

tical to those held by Topps. The players will suffer no deprivation of contractual rights from such an assignment because Topps's rights are expressly made alienable to "assigns" of Topps. (P-56) Because Topps may, in its discretion, assign its rights to more than one "assign", the Court can order it to assign the rights in a way that will permit more than one firm or group to use the rights. The players will not suffer any deprivation of rights from such an order because they have entered into contracts by which they parted with any right to grant such rights to firms other than Topps. Topps holds a valid right of assignment, and will be required to exercise it so as to remedy the anti-competitive conditions found to exist.

In ordering Topps to make such an assignment, the Court explicitly rejects Topps's characterization of the Court's findings. That characterization was as follows:

> "[T]he violation found by the Court [was a] combination to deprive others of rights to sell baseball pictures in combination with low cost, non-confectionary premiums."

Topps's Brief in Opposition to Plaintiff's Motion to Amend, at 2.

In fact, the Court's holding was *explicitly* made far broader. As the Findings of Fact made clear, the Association's 1968 efforts to compete with Topps for player contracts were aimed at all of the rights, including chewing gum rights, held by Topps. The agreement between Topps and the Association insures that the Association will not "interfere with the Topps contracts." (P-1). The only competitor with proven ability to compete with Topps for player contracts has declined to do so in exchange for a part of Topps's revenues. It is one thing not to compete with another; it is quite another thing under the antitrust laws to *agree* not to compete. The Court

emphasized the exclusion of non-confectionary competition (Findings of Fact and Conclusions of Law at 38) only because the facts relating to that part of the combination were more complicated than those relating to confectionary competition.[1]

In any event, Topps's argument would not avail it even if the defendants' joint conduct had been confined to excluding non-confectionary competition. We repeat that we do not believe that market foreclosure would be any less actionable under § 1 if those who have combined to foreclose the last part of a market have already foreclosed most of it unilaterally. See Findings of Fact and Conclusions of Law, at 39, n.7.

For Fleer to be placed in the position it would have occupied but for the defendants' unlawful conduct, it must be given a meaningful opportunity to bid for rights identical to those held by Topps. Because the Players Association has represented to the Court that it does not believe itself to hold the rights to license baseball cards alone or in combination with chewing gum candy or confection, the Court is required to remedy that condition by means of the assignment of rights that will be ordered.

Finally, the Court wants to make clear to the parties that it does not believe that the problem of individual contracting has been settled for all time. At the moment, Topps and the Association are still permitted to oppose efforts by competitors to acquire baseball card rights directly from a player. However, that part of the Injunctive Order which is designed to permit Topps to oppose indi-

1. The Association suggests, in its Motion to Amend, that its conduct in seeking to avoid litigation with Topps was not objectionable under the antitrust laws. The Court might have viewed the Association's conduct differently if the Association had not concurrently followed a policy of discouraging individual contracting with players.

vidual contracting (paragraph 5) was inserted only to prevent serious prejudice to Topps in the event that this Court's decision is reversed on appeal. The Court would expect to deal with the issue of individual contracting at the expiration of all appeals. In the meantime, meaningful competition will be possible as a result of the injunctive relief now in effect.

/s/ CLARENCE C. NEWCOMER
Clarence C. Newcomer, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 75-1803

FLEER CORPORATION

v.

TOPPS CHEWING GUM, INC. and MAJOR LEAGUE BASEBALL PLAYERS' ASSOCIATION

ORDER

AND NOW, to wit, this 16th day of August, 1980, upon consideration of the plaintiff's Motion to Amend Findings of Fact and Judgment, it is hereby Ordered that the motion is DENIED, except insofar as it requested injunctive relief similar to that entered by separate Order this date.

It is further Ordered that the Motions of defendant Topps to Reconsider Provisions of Injunctive Order and for Relief from Judgment by Reason of Newly Discovered Evidence are DENIED; and the Motion of defendant Major League Baseball Players Association to Amend Findings of Fact, Conclusions of Law, and Judgment is GRANTED in part and DENIED in part. The assessment of nominal damages against the Association was improper, because any claim to damages was expressly waived by the plaintiff. Accordingly, the judgment of June 30, 1980, is amended as follows:

> Judgment is hereby entered in favor of the plaintiff and against the defendants on all liability issues, the defendants to bear costs; and defendant Topps shall pay to the plaintiff damages of $3.00.

Injunctive relief and an award of attorneys' fees will be treated by separate Order.

The Association's Motion is denied in all other respects.

AND IT IS SO ORDERED.

/s/ CLARENCE C. NEWCOMER
Clarence C. Newcomer, *J.*

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 75-1803

FLEER CORPORATION

v.

TOPPS CHEWING GUM, INC. and MAJOR LEAGUE BASEBALL PLAYERS' ASSOCIATION

ORDER

AND NOW, to wit, this 16th day of August, 1980, it is ORDERED that the Injunctive Order of July 10, 1980 is hereby amended to add a paragraph 1f, to read as follows:

> 1f. Topps Chewing Gum, Inc., shall, by August 29, 1980 assign to the Major League Baseball Players Association a non-exclusive right to exhibit, print, produce, publish, distribute, sell or license the names, pictures, signatures and facsimiles thereof, and descriptions and/or biographical sketches of all major and minor league baseball players under contract to Topps, in any form, size, manner, material, color or languages, including but not limited to the form of trading cards, to be sold either alone or in combination with chewing gum, candy or confection, or any of them, which assignment shall reserve to Topps identical non-exclusive rights, and which assignment shall be accepted by the Major League Baseball Players Association. The assignment shall be effective for the time periods of all player contracts now held by Topps and all renewals thereof. In the event that

no such assignment and acceptance thereof are executed by August 29, 1980 they will be deemed to have been executed.

It is further ORDERED that Paragraph 2b, 2c and 4 of the Injunctive Order of July 10, 1980, are hereby amended so that wherever the date "January 1, 1981" appears therein, it shall be deemed to read "October 1, 1980".

AND IT IS SO ORDERED.

/s/ CLARENCE C. NEWCOMER
Clarence C. Newcomer, *J.*

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 75-1803

FLEER CORPORATION

Plaintiff

v.

TOPPS CHEWING GUM, INC. and MAJOR LEAGUE BASEBALL PLAYERS' ASSOCIATION

Defendants

ORDER

AND NOW, to wit, this 28th day of Augst, 1980, it is hereby ORDERED that paragraph 1(f) of the Injunctive Order dated August 16, 1980, is amended so that wherever the date "August 29, 1980" appears therein, it shall be deemed to read "September 5, 1980."

/s/ LOUIS C. BECHTLE
Louis C. Bechtle, *J.*
(as Emergency Judge on behalf of Judge Newcomer)

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 75-1803

FLEER CORPORATION

v.

TOPPS CHEWING GUM, INC., et al.

ORDER

AND Now, to wit, this 8th day of September, 1980, upon consideration of the plaintiff's Motion to Amend the Orders of July 10, 1980 and August 16, 1980, it is hereby ORDERED that the Motion is DENIED.

The plaintiff has suggested that the Court's Order of August 16, 1980, undermines the finality of earlier Orders because it refers to the possibility of future injunctive relief relating to the issue of individual contracting. The Court does not agree that the August 16 Order has such an effect. However, the Court notes, for the guidance of the parties, that the earlier statement that the Court "would expect" to deal with individual contracting was not a statement that the injunction would necessarily be modified. Rather, the Court expects the parties to raise the issue at the end of all appeals, and it *may be* that effective competition will require some sort of modification. The Court has retained jurisdiction over the injunction to deal with exactly that sort of issue, and we do not believe that the

Court's Orders of July 10, 1980 and August 16, 1980 are any less final for that reason.

Accordingly, the plaintiff's motion is denied.

AND IT IS SO ORDERED.

/s/ CLARENCE C. NEWCOMER
Clarence C. Newcomer, *J.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2537/9 and 81-1104

FLEER CORPORATION

v.

TOPPS CHEWING GUM, INC., et al., MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION

Fleer Corporation,
Appellant in Nos. 80-2537 and 81-1104
Topps Chewing Gum, Inc.,
Appellant in No. 80-2538
Major League Baseball Players Association,
Appellant in No. 80-2539

(D. C. CIVIL No. 75-1803)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GIBBONS, HUNTER and GARTH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on May 18, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered July 2, 1980 and as amended July 11 and 14, August 20 and 29 and September 9, 1980, be, and the same is hereby reversed and the cause remanded for the entry of judgment in favor of TOPPS and MLBPA. Costs taxed against FLEER.

ATTEST:

/s/ SALLY MRVOS
Clerk

August 25, 1981

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2537/38/39, 81-1104

FLEER CORPORATION

v.

TOPPS CHEWING GUM, INC.

v.

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

The petition for rehearing filed by Fleer Corporation in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ JAMES HUNTER, III
James Hunter, III, *Judge*

Dated: October 22, 1981

FORM OF AGREEMENT BETWEEN TOPPS AND PLAYERS

(Plaintiff's Exhibit 56)

PLAYER'S NAME _____

1. In consideration of the payments provided for below, I hereby grant to Topps Chewing Gum, Incorporated, its successors and assigns, the exclusive right to exhibit, print, reproduce, publish, distribute and sell my name, picture, signature and facsimile thereof, and a description and/or biographical sketch of me in any form, size, manner, material, color or language, including but not limited to the form of trading cards, to be sold either alone or in combination with chewing gum, candy and confection, or any of them, provided, however, that nothing herein shall interfere with my ability to grant such exclusive rights to others with regard to such items (a) to be sold alone, in Major League Baseball Parks only for an actual retail sales price of not less than five (5¢) cents per individual picture, or (b) to be sold alone, in all channels of distribution as pictures not smaller than 5" by 7" for an actual retail sales price of not less than twenty-five (25¢) cents per individual picture, provided, however, that Topps shall have a right of first refusal for a period of fifteen (15) days as to any bona fide offer received by me for any rights under this clause (b). Said rights are granted for the term of this contract and any extensions or renewals thereof. The rights granted herein shall not constitute a testimonial or endorsement of Topps' products except specifically and exclusively Topps Bubble Gum Brands.

2. I have reached majority. I have the full right to enter into this Agreement. I have not heretofore granted to others the rights or any part of the rights granted to Toops hereunder. I shall not during the term of this Agreement or any extension or renewal thereof, enter into any agreements with others with reference to, or involving the subject or the rights granted herein, nor will I grant to others the rights granted to Topps hereunder, or any rights similar thereto, whether such grant of rights to others be for the term of this contract or any part thereof, or whether they be for a time commencing after the expiration of this contract.

3. PAYMENT: (a) Five ($5.00) Dollars by check to me in hand, receipt of which I hereby acknowledge. I shall also receive (I) Two Hundred and Fifty ($250.00) Dollars for each Baseball Season during the term of this contract and any extensions or renewals thereof during which I am retained as an active, eligible member of a Major League Baseball Club for the first 31 consecutive days of the Championship Baseball Season without interruption, or if my picture is published and used, and (II) if I am a baseball player, a bonus payment of Seventy-five ($75.00) Dollars for extending this contract for an additional term of two years pursuant to Topps' policy of attempting to extend its contracts with baseball players in order to keep baseball players under contract for up to five baseball seasons in advance.

(b) There shall also be paid by Topps to the Major League Baseball Players Association, for inclusion in and distribution in accordance with the Major League Baseball Players Association's group licensing program, an additional sum for each Championship Baseball Season during the term of this contract and any extensions or renewals thereof, of my pro rata portion of the excess, if

any, of (I) the total amount of a royalty of eight (8%) percent of Topps' net sales (hereinafter defined) up to $4,000,000.00 and ten (10%) percent of Topps' net sales in excess of $4,000,000.00, made in the calendar year of any such Baseball Season, over (II) the total amount paid in that year to major league baseball players, managers, coaches and trainers pursuant to clauses (I) and (II) of Paragraph 3(a) cf. contracts in form identical to this contract. "Topps' net sales" shall mean all sales of Topps' products employing the rights provided for in Topps' contracts with major league baseball players, managers, coaches and trainers, less trade discounts, returns and allowances made to customers.

(c) If Topps shall contract with the National Football League and/or the National Football League players in any calendar year for a higher percentage royalty for the use of football players' pictures than the royalty provided for herein, then for that calendar year, the highest percentage royalty as provided for in any such football contract shall be applicable hereunder with respect to Topps' net sales as defined above. If the total guaranteed payment to the National Football League and National Football League players in any one year shall exceed the total amount paid to all major league baseball players, managers, coaches and trainers pursuant to Topps' contracts in form identical to this contract in the same year, then Topps shall for that year pay to the Major League Baseball Players Association an amount equal to the difference.

(d) It is understood that I shall have the option to accept any premium offered by Topps in lieu of a payment in cash to me and the value of said premium shall be that which will be set forth in a catalog which will be prepared by Topps and submitted to me for selection for the premium.

(e) I hereby authorize the Major League Baseball Players Association, on my behalf, to receive statements of account of Topps' net sales, and inspect Topps' books and records to verify said statements.

4. This contract shall be effective as of the date hereof, and shall continue and be binding upon me and Topps Chewing Gum, Incorporated, for five full Baseball Seasons in which payment becomes due to me under the terms of Paragraph 3 and (when applicable) Paragraph 7 of this contract, but the contract herein shall be deemed to end on the December 31st of the year in which the last Season falls. This contract shall be governed by the Laws of the State of New York.

5. Topps Chewing Gum, Incorporated is hereby authorized by me to enforce the rights granted to it by me in my name at its own expense.

6. I understand that acts of war, public disorder or nature, accidents to plant or machinery, orders of courts or governments or their bureaus or departments, failure of usual source of supply of material or any contingency beyond the control of Topps Chewing Gum, Incorporated, whether related or unrelated, or similar or dissimilar to any of the foregoing, shall be sufficient reason for nonpayment by Topps Chewing Gum, Incorporated, but only for the full period of the continuation of said condition; and this contract in all other respects shall continue in full force and effect.

7. Notwithstanding anything to the contrary herein contained, it is understood and agreed that if prior to the date of the execution of this contract, I have entered into a contract controlling or validly granting to others the rights or any part thereof granted to Topps Chewing Gum, Incorporated, hereunder, then nothing herein contained shall

be construed as granting to Topps Chewing Gum, Incorporated rights interfering with the exercise of such other contracts, Topps may at all times use any portion of the rights granted it which do not interfere with the rights validly granted others, and in the event only of use and publication, Topps shall pay Player the sum provided in Paragraph 3 until the expiration of such prior contracts.

Upon expiration of such prior contracts, Topps Chewing Gum, Incorporated shall be entitled to the exclusive rights provided for herein for a period of five full Baseball Seasons from the date of the expiration of such prior contract.

I shall then be entitled to payment for this period in accordance with Paragraph 3 above.

X_____ X_____

Player's Signature Date

TOPPS CHEWING GUM, INC.

_____ _____

(Authorized Agent) Date

TCG 175

THIS CONTRACT IS ON BOTH SIDES

Home address:

_____

No. Street

_____

City State Zip

Consent of Parent or Guardian (if necessary):

_____

Signature

_____

Date

FORM OF ASSOCIATION'S COMMERCIAL AUTHORIZATION

(Plaintiff's Exhibit 8)

MAJOR LEAGUE
BASEBALL PLAYERS ASSOCIATION

MARVIN J. MILLER, EXECUTIVE DIRECTOR
RICHARD M. MOSS, GENERAL COUNSEL

375 PARK AVENUE
NEW YORK, N. Y. 10022
(212) 752-0940

COMMERCIAL AUTHORIZATION

_____
(Name of Club)

Each of the undersigned hereby exclusively authorizes the Major League Baseball Players Association to market rights, together with other Major League players as a group, to the use of his name, picture (still photographs, motion pictures or television, except for Club publicity purposes) and signature. It is understood that such rights will be sold for the players as a group on an exclusive basis and shall not involve a personal endorsement by any individual.

It is also understood that monies received by the Major League Baseball Players Association for the sale of such group rights will be used to defray the cost of operation of the Players Association and that such monies will be credited to the undersigned individuals as dues paid to the Association.

Any monies earned from the sale of such group rights which exceed the budget of the Association shall be distributed among all members of the Association who have authorized the sale of such rights.

Any group licensing contract entered into with an individual company for the promotion of its products shall exclude players who are committed by contract to competitive products. In the event any such company is interested in securing a personal endorsement, it is understood that such endorsement will require the personal approval of the individual involved and a separate payment directly to him.

This authorization shall be for a three year period.

Date	Signature	Date	Signature

ARGEEMENT BETWEEN TOPPS AND THE PLAYERS' ASSOCIATION DATED NOVEMBER 19, 1968 (Plaintiff's Exhibit 1)

THIS AGREEMENT made this 19th day of November, 1968, by and between TOPPS CHEWING GUM, INCORPORATED, a New York corporation, having its principal place of business at 254 Thirty-sixth Street, Brooklyn, New York, hereinafter called "TOPPS", and the MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, an unincorporated Association, having its principal place of business at 375 Park Avenue, New York, New York, hereinafter called the "ASSOCIATION".

WITNESSETH:

WHEREAS, the Association represents all the major league baseball players, managers, coaches and trainers, and it is fully authorized by them to enter into this agreement, and

WHEREAS, Topps has contracts, a form of which is attached hereto as Exhibit A, with major league baseball players, managers, coaches and trainers ("Baseball Personnel"), pursuant to which Topps has acquired certain exclusive rights to exhibit, print, reproduce, publish, distribute and sell their names, pictures, signatures and facsimiles thereof, to be sold either alone or in combination with chewing gum, candy and confection, or any of them, and

WHEREAS, Topps and the Association desire to amend such contracts and future contracts between Topps and Baseball Personnel, and provide additional payments to Baseball Personnel,

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

1. Topps agrees to amend its present and future contracts with Baseball Personnel, beginning with the baseball season of 1969, in accordance with the form attached hereto as Exhibit B and made a part hereof. Each of Topps present contracts with Baseball Personnel in the form of Exhibit A, shall be deemed to be amended in accordance with the provisions of Exhibit B without the necessity of either party executing a new contract. It is understood and agreed that such amendments are being made by Topps in consideration of the execution of this Agreement by the Association.

2. All payments to be made by Topps hereunder shall be made directly to the Baseball Personnel. Topps agrees to maintain detailed records of payments to Baseball Personnel and of "Topps' net sales" (as defined in Exhibit B) and shall submit to the Association, promptly at the close of each year, a written detailed statement of such payment and net sales. The Association, upon demand at any reasonable time, shall have the right to inspect Topps' books of account to verify said figures. Said inspection shall be conducted only by a certified public accountant at the Association's expense.

3. Topps agrees not to change its term or policy with respect to the contracts it has or will make with present or future Baseball Personnel during the existence of this Agreement.

4. The Association agrees that it will not interfere with the Topps contracts, its procurement of such contracts or its policy during the existence of this Agreement.

5. In the event the Association receives from a third party a proposal for a license agreement which would infringe upon the rights granted to Topps by Baseball Per-

sonnel, Topps agrees to consider and advise the Association whether or not it will release its rights for the use proposed.

6. This Agreement shall continue for a period of eight (8) years from the date hereof.

7. This Agreement shall be construed and enforced in accordance with the laws of the State of New York, and cannot be changed orally, and will be binding upon the parties hereto and their respective successors and assigns.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written.

TOPPS CHEWING GUM, INCORPORATED
By /s/ JOEL J. SHORIN
President

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION

/s/ By MARVIN J. MILLER
Executive Director

In consideration of the payments provided for below, I hereby grant to Topps Chewing Gum, Inc., its successors and assigns, the exclusive right to exhibit, print, reproduce, publish, distribute and sell my name, picture, signature and facsimile thereof, and a description and/or biographical sketch of me in any form, size, manner, material, color or language, including but not limited to the form of trading cards, to be sold either alone or in combination with chewing gum, candy and confection, or any of them. Said rights are granted for the term of this contract and any extensions or renewals thereof. The rights granted herein shall not constitute a testimonial or endorsement of Topps products except specifically and exclusively Topps Bubble Gum Brands.

I am over 21 years of age. I have the full right to enter into this Agreement. I have not heretofore granted to others the rights or any part of the rights granted to Topps hereunder. I shall not during the term of this Agreement or any extension or renewal thereof, enter into any agreements with others with reference to, or involving the subject or the rights granted herein, nor will I grant to others the rights granted to Topps hereunder, or any rights similar thereto, whether such grant of rights to others be for the term of this contract or any part thereof, or whether they be for a time commencing after the expiration of this contract.

PAYMENT: Five Dollars (5.00) by check to me in hand, receipt of which I hereby acknowledge. I shall also receive One Hundred and Twenty Five Dollars ($125.00) for each Baseball Season of the term of this contract during which I am retained as an active, eligible member of a Major League Baseball Club for the first 31 consecutive days of the Championship Baseball Season without interruption, or if my picture is published and used.

This contract shall be effective as of the date hereof, and shall continue and be binding upon me and Topps Chewing Gum, Inc., for five full Baseball Seasons in which payment becomes due to me under the terms of Provision 3 and (when applicable) Provision 7 of this contract, but the contract herein shall be deemed to end on the December 31st of the year in which the last Season falls. This contract shall be governed by the Laws of the State of New York.

Topps Chewing Gum, Inc., is hereby authorized by me to enforce the rights granted to it by me in my name at its own expense.

I understand that acts of war, public disorder or nature, accidents to plant or machinery, orders of courts or governments or their bureaus or departments, failure of usual source of supply of material or any contingency beyond the control of Topps Chewing Gum, Inc., whether related or unrelated, or similar or dissimilar to any of the foregoing, shall be sufficient reason for non-payment by Topps Chewing Gum, Inc., but only for the full period of the continuation of said condition; and the contract in all other respects shall continue in full force and effect.

Notwithstanding anything to the contrary herein contained, it is understood and agreed that if prior to the date of the execution of this contract, I have entered into a contract controlling or validly granting to others the rights or any part thereof granted to Topps Chewing Gum, Inc., hereunder, then nothing herein contained shall be construed as granting to Topps Chewing Gum, Inc., rights interfering with the exercise of such other contracts. Topps may at all times use any portion of the rights granted it which do not interfere with the rights validly granted others, and in the event only of use and publication, Topps shall pay Player the sum provided in Paragraph "3" until the expiration of such prior contracts.

Upon expiration of such prior contracts Topps Chewing Gum, Inc., shall be entitled to the exclusive rights provided for herein for a period of five full Baseball Seasons from the date of the expiration of such prior contract. I shall then be entitled to payment for this period in accordance with Paragraph "3" above.

X _____ X _____

Player's Signature Date

TOPPS CHEWING GUM, INC.

X _____ X _____

(Authorized Agent) Date

TCG 160

PLAYER'S NAME _____

1. In consideration of the payments provided for below, I hereby grant to Topps Chewing Gum, Incorporated, its successors and assigns, the exclusive right to exhibit, print, reproduce, publish, distribute and sell my name, picture, signature and facsimile thereof, and a description and/or biographical sketch of me in any form, size, manner, material, color or language, including but not limited to the form of trading cards, to be sold either alone or in combination with chewing gum, candy and confection, or any of them, provided, however, that nothing herein shall interfere with my ability to grant such exclusive rights to others with regard to such items (a) to be sold alone, in Major League Baseball Parks only for an actual retail sales price of not less than five (5¢) cents per individual picture, or (b) to be sold alone, in all channels of distribution as pictures not smaller than 5" by 7" for an actual retail sales price of not less than twenty-five (25¢) cents per individual picture, provided, however, that Topps shall have a right of first refusal for a period of fifteen (15) days as to any bona fide offer received by me for any rights under this clause (b). Said rights are granted for the term of this contract and any extensions or renewals thereof. The rights granted herein shall not constitute a testimonial or endorsement of Topps's products except specifically and exclusively Topps Bubble Gum Brands.

2. I am over 21 years of age. I have the full right to enter into this Agreement. I have not heretofore granted to others the rights or any part of the rights granted to Topps hereunder. I shall not during the term of this Agreement or any extension or renewal thereof, enter into any agreements with others with reference to, or involving the subject or the rights granted herein, nor will I

grant to others the rights granted to Topps hereunder, or any rights similar thereto, whether such grant of rights to others be for the term of this contract or any part thereof, or whether they be for a time commencing after the expiration of this contract.

3. PAYMENT: (a) Five ($5.00) Dollars by check to me in hand, receipt of which I hereby acknowledge. I shall also receive (i) Two Hundred and Fifty ($250.00) Dollars for each Baseball Season during the term of this contract and any extensions or renewals thereof during which I am retained as an active, eligible member of a Major League Baseball Club for the first 31 consecutive days of the Championship Baseball Season without interruption, or if my picture is published and used, and (ii) if I am a baseball player, a bonus payment of Seventy-five ($75.00) Dollars for extending this contract for an additional term of two years pursuant to Topps' policy of attempting to extend its contracts with baseball players in order to keep baseball players under contract for up to five baseball seasons in advance.

(b) I shall also receive an additional sum for each Championship Baseball Season during the term of this contract and any extensions or renewals thereof, of my pro rata portion of the excess, if any, of (i) the total amount of a royalty of eight (8%) percent of Topps' net sales (hereinafter defined) up to $4,000,000.00 and ten (10%) percent of Topps' net sales in excess of $4,000,000.00, made in the calendar year of any such Baseball Season, over (ii) the total amount paid in that year to major league baseball players, managers, coaches and trainers pursuant to clauses (i) and (ii) of Paragraph 3(a) of contracts in form identical to this contract. If Topps' net sales have not reached $4,000,000.00 during any calendar year from 1969 through 1973, then the rate

of royalty hereunder shall be eight (8%) percent of Topps' net sales up to $3,500,000.00 and ten (10%) percent of Topps' net sales in excess of $3,500,000.00, starting with the year 1974 and thereafter during the term of this contract and any extensions or renewals thereof. "Topps' net sales" shall mean all sales of Topps' products employing the rights provided for in Topps' contracts with major league baseball players, managers, coaches and trainers, less trade discounts, returns and allowances made to customers.

(c) If Topps shall contract with the National Football League and/or the American Football League and/or the players of either or both leagues with respect to any year beginning with 1970, for a higher percentage royalty for the use of football players' pictures than the royalty provided for herein, then for that calendar year, the highest percentage royalty as provided for in any such football contract shall be applicable hereunder with respect to Topps' net sales as defined above. If the total guaranteed payment to the National Football League, the American Football League and the players of both leagues in any one year shall exceed the total amount paid to all major league baseball players, managers, coaches and trainers pursuant to Topps' contracts in form identical to this contract in the same year, then Topps shall for that year pay to me my pro rata portion of an amount equal to the difference. The provisions of this paragraph shall not take effect until the year 1970.

(d) It is understood that I shall have the option to accept any premium offered by Topps in lieu of a payment in cash to me and the value of said premium shall be that which will be set forth in a catalog which will be prepared by Topps and submitted to me for selection for the premium.

(e) I hereby authorize the Major League Baseball Players Association on my behalf, to receive statements of account of Topps' net sales, and inspect Topps' books and records to verify said statements.

4. This contract shall be effective as of the date hereof, and shall continue and be binding upon me and Topps Chewing Gum, Incorporated, for five full Baseball Seasons in which payment becomes due to me under the terms of Paragraph 3 and (when applicable) Paragraph 7 of this contract, but the contract herein shall be deemed to end on the December 31st of the year in which the last Season falls. This contract shall be governed by the Laws of the State of New York.

5. Topps Chewing Gum, Incorporated is hereby authorized by me to enforce the rights granted to it by me in my name at its own expense.

6. I understand that acts of war, public disorder or nature, accidents to plant or machinery, orders of courts or governments or their bureaus or departments, failure of usual source of supply of material or any contingency beyond the control of Topps Chewing Gum, Incorporated, whether related or unrelated, or similar or dissimilar to any of the foregoing, shall be sufficient reason for nonpayment by Topps Chewing Gum, Incorporated, but only for the full period of the continuation of said condition; and this contract in all other respects shall continue in full force and effect.

7. Notwithstanding anything to the contrary herein contained, it is understood and agreed that if prior to the date of the execution of this contract, I have entered into a contract controlling or validly granting to others the rights or any part thereof granted to Topps Chewing Gum, Incorporated, hereunder, then nothing herein contained

shall be construed as granting to Topps Chewing Gum, Incorporated rights interfering with the exercise of such other contracts. Topps may at all times use any portion of the rights granted it which do not interfere with the rights validly granted others, and in the event only of use and publication, Topps shall pay Player the sum provided in Paragraph 3 until the expiration of such prior contracts. Upon expiration of such prior contracts, Topps Chewing Gum, Incorporated, shall be entitled to the exclusive rights provided for herein for a period of five full Baseball Seasons from the date of the expiration of such prior contract. I shall then be entitled to payment for this period in accordance with Paragraph 3 above.

X _____ X _____

Player's Signature Date

TOPPS CHEWING GUM, INC.

X _____ X _____

(Authorized Agent) Date

G 169 THIS CONTRACT IS ON BOTH SIDES.

Opposition

Office - Supreme Court, U.S.
FILED
FEB 22 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1358

In The

Supreme Court of the United States

October Term, 1981

FLEER CORPORATION,

Petitioner,

—v.—

TOPPS CHEWING GUM, INC.,

and

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION IN OPPOSITION

HAROLD F. MCGUIRE, JR.
(Counsel of Record)
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In The

Supreme Court of the United States

No. 81-1358

October Term, 1981

FLEER CORPORATION,

Petitioner,

—v.—

TOPPS CHEWING GUM, INC.,

and

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION IN OPPOSITION

Statement of the Case

This is a "rule of reason" case under Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1890). The petitioner ("Fleer"), plaintiff in the district court, manufactures chewing gum and novelties. It claimed to have been excluded from the market for baseball trading cards in the period 1966-1974 as a result of an alleged unreasonable restraint of trade by the defendants.[1]

[1] Fleer also contended that the same facts required findings of monopolization under Sherman Act Section 2.

The principal defendant ("Topps") was another chewing gum manufacturer which, during 1966-1974, obtained and exploited the rights to use baseball players' pictures on trading cards. Topps did this by signing exclusive individual contracts with all active major league and minor league players. The Topps standard-form contract with each individual player (A 115)[2] licensed Topps to use that player's likeness "alone, or in combination with chewing gum, candy and confection, or any of them," for a period of five major league playing seasons.

The other defendant was the Major League Baseball Players Association ("MLBPA" or "Association"), a labor organization representing the players. While not a party to any of Topps' contracts with individual players, the MLBPA negotiated with Topps in 1968 to improve the financial return to the players on those contracts. When Topps did so, the MLBPA agreed not to interfere with Topps' contracts for the next eight years (A 122-24). The agreements was subsequently extended, and expired on November 19, 1981.[3] The MLBPA also acted as an agent for substantially all major league baseball players in connection with the licensing of group promotional rights that were not covered by existing contracts entered into between Topps and individual players. This agency arrangement covered, among other things, group rights to use player likenesses on trading cards sold in combination with non-confectionary products. The Association's contracts with the players, known as "commercial authorization" agreements (A 120-21), permitted the Association to sub-license others to use the players' names, pictures, and signatures in group promotions for three years.

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[2] References in the form "A...." are to the Appendix to the petition for certiorari.

[3] A copy of the extension agreement was introduced at trial as Fleer's Exhibit 44 (page A-915 of the appendix in the Third Circuit). Petitioner has not seen fit to inform this Court that the agreement of which it complains has expired.

At a bench trial in the Eastern District of Pennsylvania, Fleer contended that Topps' aggregation of contracts with individual players foreclosed Fleer from entry into most of the baseball card market, and that the players' agreements with the MLBPA foreclosed the rest. Fleer argued that no "meaningful" competition to Topps existed in the marketplace.[4] The district court (Newcomer, J.) accepted these arguments and decreed that Topps should make its rights available to the MLBPA, which in turn should offer them to Fleer and others on a non-exclusive basis. However, the Court of Appeals for the Third Circuit, employing an exhaustive "rule of reason" analysis (A 1-32), reversed. It ordered judgment for both defendants (A 112-13) and denied rehearing (A 114).

The Third Circuit accepted *arguendo* the district court's market definition,[5] but held that Topps' accumulation of individual player contracts did not constitute an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. Anyone who wanted to merchandise candy, gum or confections with players' pictures, it reasoned, was free, over time, to compete with Topps to obtain contracts with players (A 24). Further, it held, the MLBPA's "commercial authorization" agreements, far from restraining trade, were actually pro-competitive in that they provided swift and easy access to the market for would-be competitors of Topps who wished to sell trading cards together with non-confectionary items (A 24-25). The Court of Appeals found absolutely no evidence (in a detailed record covering the events of approximately eight years) of any concerted action between Topps

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[4] Fleer itself had sold all its contracts with ballplayers to Topps in 1966.

[5] "All pocket-size pictures of active major league players, sold alone or in connection with a low cost premium, in packages priced from 15 cents to 50 cents" (A 52-53, par. 87).

and the MLBPA which had the purpose or effect of foreclosing anyone from the market. Hence it found no combination in restraint of trade. The Third Circuit flatly stated there was "no support in the record" (A 25) for the trial judge's contrary finding. Indeed, the Third Circuit pointed out, there were numerous instances in which the MLBPA had granted trading card licenses to Topps' would-be competitors over Topps' objection (A 25-27). Moreover, as the Court of Appeals noted, Topps and the MLBPA were themselves so far from being competitors engaged in a horizontal restraint of trade that to label them as such "stretches the usefulness of the term" (A 28).

Reasons For Denying The Petition

The issue now before the Court is whether the Third Circuit's decision involved any issues of law so significant as to merit review by certiorari. It did not. Rather, the decision below was specifically related to the facts of the case and had few, if any, features of general applicability.

As regards the MLBPA, the Third Circuit reversed the district judge on two mixed propositions of law and fact:

1) The Third Circuit found (A 24, 32) that the MLBPA's commercial authorization program was procompetitive because it created the possibility of market entry for Topps' potential competitors. The district court, while recognizing that proposition (A 93), had not accorded it sufficient weight. Rather—disregarding significant contrary facts and based solely on the MLBPA's 1968 agreement not to interfere with Topps—the district court had inferred that the MLBPA was not willing to license Topps' competitors to sell baseball cards with low-cost non-confectionary products. The Third Circuit, reviewing the record, found absolutely no evidence of such an atti-

tude. Accordingly, it saw "no support in the record" (A 25) for the district court's speculative conclusion (A 79) that "but for P-1 [the 1968 agreement], some low cost non-confectionary or other competitive item would have been licensed by the Association."[6]

2) The Third Circuit held that "[a]side from the 1968 contract, there is no evidence of concert of action between Topps and the Association" (A 25). Without a "unity of purpose or common design" (A 29) between Topps and the MLBPA, the Third Circuit held, the unilateral actions of the Association in granting or refusing to grant trading card licenses did not constitute a "combination" with Topps to restrain trade in violation of the Sherman Act. By contrast, the district judge—while admitting the paucity of evidence of concerted unlawful action and stating that the MLBPA had acted in its own economic interest—had nonetheless found such a "combination" (A 77).

In reversing the district court on these two related propositions, the Third Circuit operated well within the accepted confines of antitrust law. Employing the "rule of reason," the Third Circuit simply substituted its judgment for that of the district court as to whether particular written contracts unreasonably restrained trade in a particular market at a particular time. Additionally, using accepted standards, it found no joint conduct which constituted an unlawful "combination" between the MLBPA and Topps. In deciding these issues, the Third Circuit promulgated no new antitrust doctrines, changed no old ones, and did nothing in conflict with the decisions of this Court or any sister Circuit. Rather, it engaged in a searching and comprehensive analysis of the evidence and decided, on the facts of record, that the district

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[6] The district court itself had conceded that the 1968 agreement was "not, on its face, anti-competitive" (A 58, par. 109).

court was mistaken and the Association's conduct did not offend the law. The factual situation, of course, was *sui generis*. Therefore, important though the Third Circuit's decision be to the parties, there is nothing in it which has the slightest significance with respect to this Court's oversight of the administration of the antitrust laws.

1. The Third Circuit did not depart from normal and appropriate standards of review in reversing the district court.

Petitioner attempts (petition at 8-10) to invoke this Court's supervisory powers by arguing that the Third Circuit engaged in an extreme departure from the accepted and usual course of judicial proceedings when it reversed District Judge Newcomer. In that regard, petitioner argues that the Third Circuit disregarded Rule 52(a) of the Federal Rules of Civil Procedure, which sets up a "clearly erroneous" standard for the review of factual findings by an appellate court. Petitioner suggests that this Court grant certiorari to make it clear to the Courts of Appeals that they should not disregard Rule 52(a).

The answers to this argument are simplicity itself. First, the district court's key determinations, set forth above, were not "factual findings" subject to Rule 52(a), but rather mixed ultimate determinations of fact and law, to which the "clearly erroneous" standard does not apply. Second, to the extent that factual matters were involved in the reversal, the Third Circuit's flat statements that "there is no evidence of concert of action" (A 25) and that "there is no support in the record for [the district court's] finding" (*id.*) certainly satisfy any standard of judicial review. Obviously, if a factual find-

ing is entirely without evidentiary support, it is "clearly erroneous." [7]

2. The Third Circuit did not create an immunity from the antitrust laws which would require review by this Court.

Petitioner also strains the language and reasoning of the Third Circuit's decision by contending that it set up an "immunity to the antitrust laws" (petition at 15) for accumulations of publicity rights. Petitioner urges this Court to strike down the "immunity." The Court of Appeals, of course, never even arguably created one. Rather, it held that particular aggregations of contract rights in the hands of Topps and the Association did not unreasonably restrain trade in the context of this particular case (A 18-25). That decision was in accord with the methodological teaching of this Court, which held in *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 99 S. Ct. 1551, 60 L.Ed.2d 1 (1979), that a "rule of reason" analysis was appropriate in such cases. On the merits, the Third Circuit's resolution of the issue agreed with that of other Circuits, *e.g.*, *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1, 4 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045, 88 S. Ct. 761, 19 L.Ed.2d 838 (1968).

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[7] The issues of the reasonableness of any restraint of trade, and of the existence *vel non* of concerted action, were fully explored in the Court of Appeals. The Association's briefs to the Third Circuit were focused on these points. The district court itself cited no factual basis for its statements which the Association challenged, and which the Court of Appeals said lacked record support. Fleer was never able to supply a single reference, in a record of many thousands of pages, to buttress those statements.

3. This Court need not review the standard employed by the Third Circuit as to the exclusion of competition.

Fleer also argues (petition at 10-13) that the Third Circuit's decision erroneously articulated the standard for monopolization under Section 2 of the Sherman Act. Employing a transparent distortion of the Court of Appeals' opinion as a whole, Fleer interprets it to hold that for monopolization to occur, there must be the power and intent "'to exclude *all* competition from the relevant market' . . . (emphasis added)." Petition at 10. Fleer says this conflicts with established law. But the Court of Appeals did not in fact set forth any such standard. In the plainest possible terms, it merely held (A 31-32) that the possibility of competition in the district court's market was realistic and—far from being foreclosed—was promoted by the MLBPA's actions:

> "As was discussed in reference to the section 1 claims, the contracts at issue did not foreclose competition in the relevant product market. *In sales of trading cards with gum, rival manufacturers could compete against Topps for minor league player's licenses.* That such a program might take five or six years before a product could be marketed is a reflection of the minor league farm system and does not mean competition was foreclosed. *In sales of trading cards with non-confectionary low cost products, Topp's exclusive licensing agreements had no effect. Indeed, the commercial authorization program of the MLBPA promoted competition in the non-confectionary goods market.* Individual manufacturers concluded one agreement with the Association, rather than chasing down hundreds of individual players." (A 31-32) (Emphasis added.)

True it is that, in its concluding paragraph, the Third Circuit does use the word "all" in describing the competition which Topps and the MLBPA did not have the power to exclude. The word was perhaps inartful, but it is plain that the Court meant—and said elsewhere—that meaningful avenues of competitive opportunity existed within the market.[8]

4. This matter is moot as to the MLBPA

As related above, the Court of Appeals held that the commercial authorization program was pro-competitive, that the 1968 agreement had no anti-competitive consequences, and, indeed, that to regard the MLBPA and Topps as competitors "stretches the usefulness of the term." But even if the Third Circuit were totally in error on these points, certiorari should not be granted because the case is now moot: the Topps-MLBPA agreement expired on November 19, 1981.[9] Thus, the only basis on which the District Court ever enjoined the MLBPA has utterly disappeared: in petitioner's own words and own reasoning, the MLBPA is again—if it ever was—a "competitor for player licensing rights" (petition at 5) against Topps. There being no issue in this case of past damages,

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[8] While finding a violation of Section 2, the district court had conceded that analysis under Section 1 of the Sherman Act suited the facts better (A 83). The MLBPA argued in the Court of Appeals that, in any event, no Section 2 case had ever before found a shared monopoly to exist. *See, e.g.*, FTC Order and Commissioners' Statements in Cereals Case, *Antitrust & Trade Regulation Report* (BNA), Vol. 42, No. 1048, p. 182 (Jan. 21, 1982). The Third Circuit found it unnecessary to resolve the troublesome question of whether Section 2 encompassed shared monopolies, since it found none in this case as a matter of fact.

[9] It is remarkable that petitioner has not brought this fact to the Court's attention. It is even more remarkable that Fleer has not mentioned that it is, at present, an actual participant in the market from which it claims to have been excluded, having obtained a license from the MLBPA to distribute trading cards with non-confectionary products.

there is no longer a controversy between Fleer and the MLBPA, since the alleged competitive *status quo ante* has been restored.

This Court is not an advisory body. Indeed, last month, the constitutional case or controversy requirement was reiterated *per curiam* in terms directly applicable to the petition here, where a regulation complained of was no longer in effect:

> "Thus, the issue of the validity of the old regulation is moot, for this case has 'lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract questions of law.' *Hall* v. *Beals*, 396 U.S. 45, 48 (1969) (*per curiam*)."

Princeton University v. *Schmid*, — U.S. —, 50 U.S.L.W. 4159, 4160 (Jan. 13, 1982).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Opposition

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Office - Supreme Court, U.S.
FILED
FEB 22 1982
ALEXAN

No. 81-1358

IN THE

Supreme Court of the United States

October Term, 1981

FLEER CORPORATION,

Petitioner,

v.

TOPPS CHEWING GUM, INC.,

and

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF TOPPS CHEWING GUM, INC. IN OPPOSITION

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NOTE: Topps Chewing Gum, Inc., has no parent company and no subsidiaries which are not wholly owned.

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STATEMENT.

Introduction.

By its petition for a writ of certiorari, the plaintiff in this treble-damage antitrust action seeks to have this Court review the unanimous decision of a panel of the United States Court of Appeals for the Third Circuit, reversing the decision of the United States District Court for the Eastern District of Pennsylvania from which both plaintiff and defendants had appealed.

The court of appeals held that there was no support in the record for the crucial finding on which the district court had based its conclusion that defendants had violated Sections 1 and 2 of the Sherman Act. Petitioner has not challenged this basic premise of the court of appeals' opinion, recognizing that this Court does not generally exercise its discretion to review the record of a twenty-five-day trial, with 8,000 exhibits, in order to determine whether a trial court's findings of facts are supported by evidence. Instead, petitioner seeks to raise three legal issues, none of which either meets the Court's standards for the grant of certiorari or is raised by the court of appeals' decision.

Factual Background.

The subject matter of this litigation is baseball trading cards, which have been sold since the end of the 19th century when they were used as premiums with cigarettes and tobacco. Respondent Topps Chewing Gum, Inc. ("Topps") began to market baseball cards with bubble gum, which had become a popular product with cards, in 1949. (Pet. App. A4).[1] Many other firms have merchandised baseball cards

1. The designation of "App." refers to the Appendix in the court of appeals.

"Pet. App." refers to the Appendix to the Petition in this Court.

with various products. For example, in 1960 Leaf Chewing Gum sold baseball cards with marbles, and in 1963 petitioner Fleer Corporation ("Fleer") itself sold baseball cards with a cookie. (Pet. App. A44, ¶ 44; *see* **Topps Chewing Gum**, 67 FTC 744, 754-60 (1965), for a history of baseball trading cards.) Since 1966, other companies have obtained from respondent Major League Baseball Players Association ("MLBPA" or "Players Association"), acting for the players, group licenses to sell baseball trading cards with bread or snack cakes (App. 1999 ff.), novelty items (App. 932 ff.), and cereal (App. 2022 ff., A2040 ff.).

In 1958, almost ten years after Topps first sold baseball cards with bubblegum, Fleer began to compete with Topps for assignments from baseball players of rights to market their likenesses alone, or with gum, candy, or confection. (App. 807-08, 1628 ff.) At the same time, Fleer filed an application for a complaint with the Federal Trade Commission, alleging that Topps' exclusive contracts and practices were unlawful. (App. 823-24, 2063 ff.) After the FTC upheld Topps' limited contracts, Fleer sold all its contracts with baseball players to Topps for $395,000. (Pet. App. A44, ¶ 44). Fleer's rights for trading cards with cookies had been allowed to lapse before then.

When Marvin Miller became executive director of the Players Association, he sought to improve the terms of the contracts under which Topps obtained directly from the players the right to publish players' pictures. (Pet. App. A8.) Miller also initiated discussions with Fleer, which at that time still had contracts with the players, and recommended that the players sign Fleer contracts instead of Topps contracts. (App. 249-50, 476-78) Soon thereafter, however, Fleer sold its contracts to Topps without consulting Miller or the MLBPA. (App. 249-50, 478-79, 566-67.) Miller thereafter attempted to enter into an agreement with Fleer to provide rights to market player

likenesses with a non-confectionary product immediately or with gum in the future, but could not persuade Fleer to do so.

In 1968, the MLBPA recommended that players not renew with Topps in order to bring Topps to the negotiating table. When as a result many players refused to renew with Topps, Topps negotiated an agreement with the MLBPA which improved the payments given individual players and guaranteed the players a percentage royalty in addition to the former flat fee.

Thereafter, when neither Topps nor the MLBPA would grant Fleer rights to enter that limited portion of the market which it had abandoned to Topps in 1966, Fleer filed this suit.

The Decision of the District Court.

The district court determined that Topps and the Players Association had combined to restrain trade in a narrowly-defined submarket in violation of Sections 1 and 2 of the Sherman Act. That submarket was "all pocket-size pictures of active major league players, sold alone or in combination with a low cost premium, in packages priced from 15 cents to 50 cents." (Pet. App. A52-A53, ¶ 87.)

Certain non-confectionary products sold with baseball cards would have provided meaningful competition with Topps' product, according to the district court (Pet. App. A52, ¶ 86, A75-A76), but it held that Topps and the MLBPA acted jointly to exclude Topps' competitors. The district court found that Topps had an interest in excluding producers of baseball cards to be sold with low-cost premiums. However, the district court found specifically that "the Association did not act at Topps' behest in rejecting or requesting modification in certain low cost non-confectionary licensing proposals. Rather," the court held, "the Association acted in its own interests." (Pet App. A79).

The entire basis for the district court's finding of joint action was the 1968 agreement between Topps and

the Players Association, as the players' representative, in which Topps agreed to pay a percentage royalty in addition to a flat fee under Topps' individual contracts with each player. This royalty provided the players a significant increase in remuneration for their rights over Topps' former flat fee alone. According to the district court, the percentage royalty provisions under this agreement (Pet. App. A122-A132) made the Players Association's self-interest coincide with Topps. Although it found that the 1968 agreement was "not, on its face, anti-competitive" (Pet. App. A58, ¶ 109), the district court concluded that the 1968 agreement served to interlock the Topps' exclusive contracts with the players for the rights to market baseball player likenesses alone or with gum, candy, or confection and the commercial authorizations that the players had executed on behalf of the Players Association for group publicity rights (Pet. App. A77). In this context, according to the district court, the 1968 agreement reduced the Players Association's incentive to license baseball card products competitive with Topps' products and therefore unreasonably restrained trade by foreclosing entry to "the baseball card submarket." (Pet. App. A57, ¶ 106, A79).

The district court also held that the defendants had violated Section 2 of the Sherman Act "for virtually the same reasons that the defendants had been found to have violated § 1 of the Sherman Act." (Pet. App. A83).

The Decision of the Court of Appeals.

Upon appeal by all the parties, the court of appeals reversed the district court's finding of violation.

The court of appeals stated that it would assume but would not decide the correctness of the district court's definition of the relevant market (Pet. App. A17), and reviewed the parties' conduct as it affected that market. The court recognized that, of the three sets of contracts involved in the case, only the 1968 agreement between the MLBPA and Topps could support the district court's

finding of violation of Section 1, since it was the only one between the two named parties. (Pet. App. A17 n. 12). Analyzing that agreement, the court of appeals held that there was "no support in the record" for the district court's finding that " 'but for P-1 [the 1968 agreement] some low cost non-confectionary or other competitive item would have been licensed by the Association.' " (Pet. App. A25, *quoting* Pet. App. A79.)

The court reviewed the district court's reasoning that the 1968 agreement and the prior limited grants of publicity rights by the individual players to Topps and the Players Association had a combined effect that created an unreasonable restraint of trade. Unlike the district court, however, the court of appeals held that rule of reason analysis required consideration of the players' right of publicity (see Pet. App. A21)—a right disregarded by the district court. In that context, the court of appeals held that Topps' licensing agreements with the players could not be said to restrain trade unreasonably (Pet. App. A24) and agreed with the district court that the commercial authorization program was actually pro-competitive (Pet. App. A24, A93).

Reviewing the record, the court of appeals found that apart from the 1968 agreement, there was "no evidence of concert of action between Topps and the Association" that would justify a conclusion that the cumulative effect of the three series of agreements constituted an unreasonable restraint of trade. (Pet. App. A25-A26, A30). The various agreements did not interlock to foreclose competitive licensing opportunities, the court of appeals held. (Pet. App. A29-A30.) The court rejected the district court's characterization of Topps and the Players Association as horizontal competitors, and held that the Players Association acted unilaterally and within its lawful rights in its licensing decisions. In so holding, the court of appeals followed the district court's own conclusions that "the Association did not act at Topps's behest in rejecting, or

requesting modification in, certain low cost non-confectionary licensing proposals" (Pet. App. A79) and that any restraint in licensing such proposals by the MLBPA was "self-imposed" in the interest of the Players Association. (Pet. App. A78).

With respect to the Section 2 Claim, the court of appeals found that "the contracts at issue did not foreclose competition in the relevant product market," and that the district court had erred in finding to the contrary. (Pet. App. A31-A32.)

ARGUMENT

Fleer has asked this Court to grant certiorari to decide three questions which it suggests were answered wrongly by the court of appeals and merit review by this Court. One conclusive answer which immediately presents itself is that even if the court of appeals had made the errors with which it is charged, these are not questions which need or are entitled to this Court's attention. The other conclusive answer is that the court of appeals did not make any of these errors, and that there was ample basis, although unacknowledged by petitioner, for that court's decision.

I. Fleer's Petition Raises No Questions Which Deserve Consideration by This Court.

Although succeeding sections of this brief answer each of petitioner's questions on the merits, we begin by noting that none of those questions merits consideration by the Court under the standards of Supreme Court Rule 17.

Thus, the Court is asked first to restate the rule that a court of appeals may not set aside controlling fact findings of a district judge without acknowledging that it has done so. Yet nothing in the petition indicates that courts of appeals have been disregarding this Court's decision in **Zenith Radio Corp. v. Hazeltine Research, Inc.**, 395 U. S. 100 (1969), that the decision of the court of appeals in this case will encourage them to do so, or that Rule 52(a), Fed. R. Civ. P., is otherwise in need of reinforcement.

Petitioner's second request is that the Court reestablish that it is not necessary to exclude all practical competition to violate Section 2 of the Sherman Act. Although the Court is asked to reaffirm its decision in **United States v. Terminal Railroad Association**, 224 U. S. 383 (1912), petitioner in no way explains how the decision of the court of appeals threatens the continued vitality of the principles of law advanced there.

Finally, the Court is asked to determine that the accumulation of publicity rights does not enjoy an exemption from the antitrust laws. In this respect, petitioner notes that the Court recently resolved the conflict between the right of publicity and the First Amendment right of the press in **Zacchini v. Scripps-Howard Broadcasting Co.**, 433 U. S. 562 (1977). Since that case resolved the conflict in favor of the right to publicity over the First Amendment, there should be no need to see how the antitrust laws would fare against the same right. *See* **United States v. Carolene Products Co.**, 304 U. S. 144, 152 n. 4 (1938).

As the succeeding sections of the brief indicate, the court of appeals misread neither Rule 52(a) nor Sections 1 and 2 of the Sherman Act; but even if, *arguendo*, petitioner were right in its view of the opinion below, it has failed to show any "special and important reasons" why this Court should review this case.

II. The Court of Appeals Reversed Because There Was No Support in the Record for a Finding of Either an Unreasonable Combination in Restraint of Trade or a Conspiracy To Monopolize.

Petitioner complains that the court of appeals abused its authority to review the district court's findings of fact under the clearly erroneous standard by failing to acknowledge the standard and explain its reasoning. This argument amounts to a frivolous claim that courts of appeals must invariably and mechanically state the authority for their review in their opinions. Here the court of appeals clearly stated its conclusion:

> "There is no support in the record for this finding [that but for the 1968 agreement some low-cost nonconfectionary or other competitive item would have been licensed by the Association]." (Pet. App. A25.)

There could be no clearer statement of the court's holding. The underlying analysis of this holding consumes 13 pages of the printed slip opinion.

The district court's findings of violation of Sections 1 and 2 of the Sherman Act were premised on its finding that through a series of interlocking exclusive licensing contracts, Topps and the MLBPA had jointly foreclosed competition in all but a small portion of the relevant market. (Pet. App. A76-A79.) Those three contracts were Topps' individual licensing agreements with the players, the commercial authorizations between the MLBPA and the players, and the 1968 agreement between the MLBPA and Topps which constituted a renegotiation of the players' earlier contracts with Topps.

The court of appeals' review of the record was an appropriate exercise of the court of appeals' power of review under the "clearly erroneous" standard set forth in Rule 52(a). The court of appeals obviously determined that "on the entire evidence [it was] left with the definite and firm conclusion that a mistake had been committed." **Zenith Radio Corp. v. Hazeltine Research, Inc.**, 395 U. S. 100, 123 (1969). There is no need for this Court to review the record again to determine whether those conclusions were correct.

Indeed, the court of appeals did not overturn the district court's findings with respect to discrete facts, but only with respect to the "ultimate fact" of the alleged unreasonable restraint. Accordingly, its review of the district court's analysis was not limited by the clearly erroneous standard that petitioner invokes. **United States v. Parke, Davis & Co.**, 362 U. S. 29, 44-45 (1960). The court of appeals' holding in this respect was manifestly based upon its conclusion that district court's application of the rule-of-reason test was drastically deficient because of four errors of analysis quite distinct from the findings of fact:

(1) The district court failed to consider the players' legal rights to make exclusive grants of publicity rights.[2]

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2. The right of publicity was established in **Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.**, 202 F. 2d 866 (2d Cir. 1953). Since that decision, the right of publicity has been recognized by

(2) The district court wrongly characterized the Players Association and Topps as horizontal competitors, when in fact they were a collective bargaining agent and a buyer respectively, operating in a vertical relation.

(3) The district court's economic analysis wrongly attributed to the 1968 agreement a disincentive effect on the Players Association's licensing activities, which was unsupported in logic or the evidence.

(4) The district court's analysis of possible entry routes into the baseball card market was illogically restrictive and attributed to the 1968 agreement factors that were simply a function of the structure of modern day baseball, as seen in the district court's own findings of fact. (*See* Pet. App. A82).

Under these circumstances, the court of appeals had no choice but to overturn the decision of the district court.

The question before the court of appeals was not, as petitioner suggests, whether the district court erred in its market and sub-market definitions. Those definitions were not questioned by the court of appeals, and that court did no violence to the district court's opinion merely because it discussed competition between Topps' products and other products, some of which did not fall within the narrow sub-market defined by the district court. If there was no unlawful combination between defendants or if the district

2. (Cont'd.)

this Court in **Zacchini v. Scripps-Howard Broadcasting Co.**, 433 U. S. 562 (1977), and by numerous courts of appeals, *see, e.g.*, **Ettore v. Philco Television Broadcasting Corp.**, 229 F. 2d 481, 486 (3d Cir.), *cert. denied*, 351 U. S. 926 (1956); **Memphis Development Foundation v. Factors Etc., Inc.**, 616 F. 2d 956 (6th Cir.), *cert. denied*, 449 U. S. 953 (1980); **Cepeda v. Swift & Co.**, 415 F. 2d 1205, 1206 (8th Cir. 1969); **Motschenbacher v. R. J. Reynolds Tobacco Co.**, 498 F. 2d 821, 824-26 (9th Cir. 1974).

court had committed a logical error in its economic analysis, that could clearly be illustrated with undisputed examples from the record across the entire relevant market and beyond.

III. The Court of Appeals Did Not Make Exclusion of All Competitors a Prerequisite to a Finding of a Section 2 Violation.

Focusing on the statement of the court of appeals that "[b]ecause we hold that Topps and the MLBPA did not have the power to exclude all competition from the relevant market, we cannot sustain the district court's finding of a section 2 violation" (Pet. App. A32), petitioner concludes that defendants were exonerated because they had left open "a theoretical avenue for entry, even though that avenue was of no practical significance." (Pet. 11.) The avenue to which petitioner refers was the potential for competition with Topps in signing individual players.

In fact, this competition for the rights to minor leaguers was only one of the avenues for entry into the district court's relevant market upon which the court of appeals relied in concluding that Section 2 had not been violated. Topps' contracts do postpone, though they do not prevent, entry into the market for sales of baseball cards alone or with confectionary products; however, that is only one slice of the district court's market. Competitors could and did compete to sell trading cards with low cost non-confectionary products. As to these, the court of appeals recognized that "Topp's [sic] exclusive licensing agreements had no effect." (Pet. App. A32.)

The court of appeals' opinion speaks for itself in explaining the avenues of entry into the district court market, avenues which were not foreclosed by the three agreements about which petitioner protests:

> "Indeed, the commercial authorization program of the MLBPA promoted competition in the non-confectionary goods market. Individual manufacturers con-

> cluded one agreement with the Association, rather than chasing down hundreds of individual players.
>
> . . .
>
> "Rejection of Fleer's 1974 proposal does not transform such a pro-competitive arrangement into a violation of the Sherman Act. Several non-confectionary product licenses have been issued by the Association since the inception of the commercial authorization program." (Pet. App. A32.)

The court of appeals' discussion of the alleged violation of Section 1 demonstrates that Topps and the MLBPA had not acted in concert to exclude competitors from the district court's relevant market. To the contrary, the court of appeals noted the several agreements entered into by the MLBPA authorizing the sale by these competitors of trading cards with non-confectionary goods. (Pet. App. A24-A25.) Based on this analysis, the court of appeals concluded that in fact the defendants had not excluded potential competition from the relevant market, and clearly, absent proof of a specific intent to monopolize, which was not found here,[3] that is the *sine qua non* of a conspiracy to monopolize claim. *See* **American Tobacco Co. v. United States**, 328 U. S. 781, 809 (1946).

IV. The Court of Appeals Did Not Hold That Accumulations of Exclusive Publicity Rights Are Immune From the Antitrust Laws.

Petitioner contends that the court of appeals "held that accumulations of exclusive publicity rights enjoy some form of immunity to the antitrust laws." (Pet. 15.) This is not what the court of appeals held. To the contrary, following the precedent of this Court in **Automatic Radio Manufacturing Co. v. Hazeltine Research, Inc.**, 339 U. S. 827, 834 (1950), and of the United States Court of Appeals

3. *See* Pet. App. A84.

for the Seventh Circuit in **L. G. Balfour Co. v. FTC**, 442 F. 2d 1, 15 (7th Cir. 1971), as well as its own decision in **Lawlor v. National Screen Service Corp.**, 270 F. 2d 146 (3d Cir. 1959), *cert. denied*, 362 U. S. 922 (1960), the court of appeals held that "[m]erely because Topps, through individual contracts with every minor league player, managed to obtain license agreements with all major league players does not make the aggregation of these contracts an unlawful combination in restraint of trade." (Pet. App. A22.)

Nor did the court disregard the Seventh Circuit's rejection in the **Balfour** case of the appellant's argument that the accumulation of patents or copyrights, or analogously publicity rights,[4] may never constitute a violation of the antitrust laws. 442 F. 2d at 15. However, the aggregation of exclusive licenses for legitimate business use is not a violation of the antitrust laws. *See* **Automatic Radio Manufacturing Co. v. Hazeltine Research, Inc.**, 339 U. S. 827, 834 (1950); **Van Dyk Research Corp. v. Xerox Corp.**, 478 F. Supp. 1268, 1324 (D. N. J. 1979), *aff'd*, 631 F. 2d 251 (3d Cir. 1980), *cert. denied*, 101 S. Ct. 3029 (1981).

In this case, the court found no violation where the record clearly showed that numerous alternative opportunities to acquire competitive rights were available and that petitioner had turned down opportunities to compete with Topps with cards and a non-confectionary premium, had rejected several opportunities to enter the market offered to it by the MLBPA, and, finally, had enhanced Topps' position by selling its rights to Topps, the very defendant about whom it complains. (Pet. App. A22-A24.)

The decision in this case does not grant an absolute immunity from the antitrust laws for accumulated rights

4. Fleer also seeks to draw a distinction between publicity rights and copyrights, patents, and trademarks on the basis that the former have been recognized by the courts whereas the latter are statutory. (Pet. 15.) In fact, the precise analogy between publicity rights and the enumerated statutory rights was drawn by this Court in **Zacchini v. Scripps-Howard Broadcasting Co.**, 433 U. S. 562, 576-77 (1977).

of publicity. Therefore, the decision does not conflict with the opinion of the Seventh Circuit in **Balfour.** Accordingly, there is no need for the Court to decide any conflict between the right of the publicity and the antitrust laws.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: February 19, 1982.

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
MAR 4 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1358

IN THE

Supreme Court of the United States

October Term, 1981

FLEER CORPORATION,

Petitioner

v.

TOPPS CHEWING GUM, INC.

and

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. The Action Is Not Moot

One of the respondents (Major League Baseball Players Association) contends that the case is moot as to it by reason of events subsequent to the decision of the Court of Appeals.[1] These subsequent events do not render the case moot as to the Association. On the contrary, they show why this case must either be reviewed by this Court or remanded to the Court of Appeals for reconsideration.

The subsequent events are important because they demonstrate a major fallacy in the Court of Appeals' rationale. The Court of Appeals reversed the District Court because it (the Court of Appeals) thought that Fleer and others could compete effectively with Topps in selling baseball trading cards by obtaining a group license from the Association (A30). In fact, the subsequent events prove the contrary.

In order to understand the significance of these events, one must keep in mind that primary consumers of baseball cards are boys age seven through twelve (A46, ¶ 50) who purchase cards in large numbers (A63). These consumers seek "the greatest number of cards for the least money", making the price per card of each package of crucial competitive importance. The inclusion of any other item in the package of cards necessarily increases the per card price and makes the package less attractive than one without the item.[2]

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1. A premise of the Association's suggestion is that Fleer does not seek damages against the Association. That premise does not apply to Topps from which Fleer seeks substantial damages.

2. The traditional package sold by Topps includes only a piece of bubble gum which is virtually worthless.

Prior to the entry of the District Court's order, the Association had never issued a license which permitted the licensee to approach Topps's per-card price.[3] However, the District Court's order required the Association to do just that, and forbade Topps from enforcing any exclusive rights that might interfere (A96; A97). The result was two price competitive licenses, one to Fleer and the other to the Donruss Company Division of General Mills, which were in effect for the 1981 baseball season.

What happened in the baseball card market during 1981 showed beyond doubt that competition in the market had previously been stifled. The Association negotiated higher royalty rates than Topps was paying from Fleer and Donruss; more cards were sold; and the aggregate payments to the Association for distribution to the players were larger than ever before.

These benefits were not lost on the Association. After the Court of Appeals' decision terminated the Fleer and Donruss licenses, the Association did its best to maintain its licensing income by issuing new licenses to both companies. Notwithstanding this change of heart, the Association has been unable to provide a completely competitive market. Topps's individual contracts, the terms of which the Association negotiated in 1968, continue. Because of these contracts, the new entrants, Fleer and Donruss, are substantially handicapped vis-a-vis Topps, the established monopolist:

> (a) Topps's player contracts prevent the Association from granting licenses to sell baseball cards alone. In an effort to avoid infringement of Topps's

3. Both respondents were responsible for this fact. Topps had a policy of objecting to licenses granting the right to sell cards either alone or with a low cost product as violative of its exclusive rights (A56, ¶ 102; A78). The Association, influenced by its substantial royalty income from Topps, was "anxious to avoid conflict with Topps" (A55, ¶ 99; A78).

rights, the Association has issued licenses to sell cards only in combination with another item of substantial cost. Thus, Topps can always have the crucial advantage of the lowest price per card.

(b) Topps's player contracts enable it to threaten the Association's licensees with infringement litigation. Subsequent to the decision of the Court of Appeals, Topps has made such threats to both Fleer and Donruss. The investments of both companies have been placed in jeopardy.

(c) Topps's player contracts enable it to pay as much as twenty percent lower royalty rates than those prevailing in the competitive market, *i.e.*, those paid by Fleer and Donruss.

Thus, the action is not moot even as to injunctive relief against the Association. The anticompetitive effect of Topps's individual contracts, for which the Association is responsible, continues.

Moreover, the effect of those contracts on the Association, Fleer and Donruss demonstrate why the Court of Appeals was wrong in assuming that the Association had the power to license products that would compete effectively with Topps. The Court of Appeals accepted Topps's argument that Topps's exclusive rights would not prevent the Association from licensing others to sell cards with a low-cost nonconfectionary item. We do not believe that the Court of Appeals would have decided the case as it did if it had known that Topps would immediately claim infringement by the first two such licenses.

II. Topps's Brief in Opposition Also Reveals the Errors of the Court of Appeals

The subsequent events are not the only things that reveal the errors of the Court of Appeals. The Brief in



Opposition filed by Topps is also revealing. We have never been able to explain the Court of Appeals' opinion without contradicting either the opinion itself or established precedent. Topps's Brief in Opposition shows that Topps cannot do so either:

1. Topps attempts to avoid the thrust of the Petition by stating (page 9) that "the court of appeals did not overturn the district court's findings with respect to discrete facts but only with respect to the ultimate fact of the alleged restraint."

Having so stated, Topps cannot correctly state (page 9) that the Court of Appeals "did no violence to the district court's opinion . . . by discussing competition between Topps's products and other products, some of which did not fall within the narrow submarket defined by the district court (page 10)". Nor can Topps state (pages 11-12) that "competitors could and did compete to sell trading cards with low cost non-confectionary products" (page 11) because "[s]everal non-confectionary licenses have been issued by the Association (page 12)." Both statements are directly contrary to the District Court's discrete findings that Topps's product was "alone" in the market (A86) and that there was no "meaningful competition" to Topps (A57).

2. Topps states (page 13) that the Court of Appeals did not disregard *L. G. Balfour Co. v. F. T. C.*, 442 F. 2d 1, 15 (7th Cir. 1971) but then asserts in justification of the Court of Appeals that "the aggregation of exclusive licenses for legitimate business use is not a violation of the antitrust laws", citing two cases relating to patents. This assertion is directly contrary to *Balfour*.

CONCLUSION

For these reasons and those in the Petition, we believe the Court should grant the Petition and either review the case or remand for further consideration by the Court of Appeals.

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